

UNIVERSITY OF CANTERBURY

DEMOCRATIC LEGITIMACY AND THE RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW

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List of Acronyms and Abbreviations

AU	Africa Union
AED	United Arab Emirates Dirham
AQIM	Al Qaeda in the Islamic Maghreb
ALS	The Arab League States
ALMC	Arab League Ministerial Council
ACDEG	Africa Charter on Democracy, Elections, and Governance
CAS	Central America State
DC	Democratic Character
DL	Democratic Legitimacy
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West Africa State
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EFD	Effective Control Doctrine
EU	European Union
FRAPH	Front for the Advancement of Progress of the Haitian People
GNC	General National Council
GCC	Gulf Cooperation Council
ISAF	International Security Assistance Force
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ISIL	The Islamic State of Iraq and the Levant
ISIS	Islamic State of Iraq and Syria
MUJWA	Movement for Oneness and Jihad in West Africa
NTC	National Transitional Council
NCSROF	National Coalition of Syrian Revolutionary and Opposition Force
OEF	Operation Enduring Freedom
OAS	The organisation of the American States

OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
ROG	Recognition of Governments
ROGC	Recognition of Governments Problems
SOC	Syrian Opposition Coalition
STNG	Somalia Transitional National Government
SSRN	Social Science Research Network
NTC	National Transitional Council
TNG	Transitional National Government
UK	United Kingdom
UN	United Nations
UNC	United Nations Charter
UDHR	Universal Declaration of Human Rights
USA	The United States of America
VC	Vienna Convention on the Law of Treaties

Abstract

Recognition of governments is one of the essential principles of international law that confirms the lawful status of an authority holder in a state. It is also one of the murkiest principles of international law with lots of controversies.

Some scholar suggests that the most suitable way to eradicate the controversies affecting this area of international law is to recognise governments that adhere strictly to a democratic legitimacy approach. They believe that the use of this standard, which relies on the use of democracy to identify the legitimate government of a state, will be a suitable replacement for the current recognition of governments approach and would end the ongoing debates on the recognition of governments in international law.

By arguing the successful application of this approach in states such as Haiti, Sierra Leone and Cote d'Ivoire, some scholars believe they have established a solution to the recognition of government controversy. This study investigates the claims and assesses whether democratic legitimacy could indeed be a suitable replacement for the current recognition of governments approach in international law.

Further, by using a comparative analysis, the study concludes that the modification of the current approach (effective control doctrine) to include a rebuttable presumption of consent would serve as a better alternative than the acclaimed democratic legitimacy.

Chapter One: Introduction to the Research

1.1. Background of the Study

More than three centuries have passed since the signing of the Peace of Westphalia, which created two main propositions for the recognition of governments in international law.¹ The first was that states are sovereign political actors. In the international realm, decolonisation, successions and the recognition of states as independent sovereign institutions demonstrated this evidence.² The second proposition, which complements the first, was that governments are established to act on behalf of states to secure citizen's inalienable rights.³ These propositions have remained relatively unchanged since 1648.

Of late, legal academics and some state representatives have come to view the recognition of governments as problematic.⁴ They argue that the rules that

¹ The Peace of Westphalia marked man's abandonment of the idea of a hierarchical structure of society and option for a new system characterised by the co-existence of a multiplicity of states, each sovereign within its territory, equal, and free from any external earthly authority. According to Lee Gross "The idea of an authority or organisation above the sovereign states is no longer. What takes its place is the notion that all states form a world-wide political system or that, at any rate, the states of Western Europe form a single political system. This new system rests on international law and the balance of power, a law operating, rather than, above states and a power operating between rather than above states." See, Leo Gross "The Peace of Westphalia, 1648-1948" (1948) 42 *The American Journal of International Law* at 29.

² Matthias Ruffert "The Administration of Kosovo and East-Timor by the international community" (2001) 50 *International and Comparative Law Quarterly* at 613-631. See also, Jean D'Aspremont "Regulating Statehood: The Kosovo Status Settlement" (2007) 20 *Leiden Journal of International Law* at 649-668.

³ Russell A Miller & Peer Zumbansen *Comparative Law as Transnational Law: A Decade of the German Law Journal* (Oxford University Press, 2012) at 65 explain that "with the celebration of the Peace of Westphalia, each Prince elector had the power to declare war, to sign peace treaties, establish alliances with other potencies and govern their respective states as they fancied, such abilities resumed the *jus foederationi* for recognition".

⁴ For a detailed analysis of the problems created by the recognition of governments and why recognition should of government should be sustain. See Martha Peterson "Recognition of Governments Should Not Be Abolished" (1983) 77 *The American Journal of International Law* at 31-50. Apart from Peterson, the following academics analyse the problems relating to recognition of governments, their causes and their implication for the status of a government: David Ernest Hudson "Recognition of Foreign Governments and Its Effect on Private Rights" (1936) 1 *Mo. L. Rev.* at 312-325, Thomas Galloway *Recognizing Foreign Governments: The Practice of the United States* (American Enterprise Institute, 1978). See also, Stanley K Hornbeck "Recognition of Governments" (1950) 44 *Am. Soc'y Int'l L. Proc.* at 182-192 discussion on the problems facing the United States with regard to the recognition of China's governments. Hornbeck notes that, while recognition of governments confers no legal obligations, it has legal consequences. He also identifies recognition as a political act that confers legal approval. See also, JJ Lador-Lederer "Recognition-A Historical Stocktaking (Part I)" (1957) 27 *Nordisk Tidsskrift Int'l Ret.* at 62 questions whether the recognition of states and governments belongs to international law. He discusses the judicial problems surrounding the recognition of governments using two theories of recognition, constitutive and declaratory. Hersch Lauterpacht

determine the recognition of a government within the international sphere conflict with some enshrined principles of international law.⁵ In particular, they believe that the rules empowering states to act on their discretion to decide on the constitutionality of a government question the autonomy of states.⁶ They add that the situation where a government is considered sufficiently constitutional by some states to warrant military assistance but is regarded as unconstitutional by others causes unnecessary diplomatic confusion.⁷

In support of these arguments, some academics argue that the failure of the August 1991 coup in the former Soviet Union, the restoration of democracy in Haiti, and the recent overthrow of undemocratic and authoritarian governments in North Africa and some Middle Eastern states undermine the recognition of governments

"Recognition of Governments" I (1945) 45 Columbia Law Review at 815-864 identifies the controversial problem of distinguishing between the legal and political views of recognition of governments. Obed Y Asamoah "Recognition of States and Governments" (1968) 5 University of Ghana Law Journal at 123 was of the view that the confusion surrounding the recognition of governments was the result of "different and hypocritical state practice and the attempts of textbook writers to construct coherent theories of recognition which are possible only through arbitrary selection of evidence." Gregory H Fox & Brad R Roth *Democratic Governance and International Law* (Cambridge University Press 2000) at 121-196. See also, Sean D Murphy "Democratic Legitimacy and the Recognition of States and Governments" (1999) 48 International and Comparative Law Quarterly at 545 to 581, Joshua Downer "Towards a Declaratory School of Government Recognition" (2013) 46 Vanderbilt Journal of Transnational Law at 581-612. See also, Robert D Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory International Law Review 107 at 112-113. See also, Pieter Kuyper, Pieter Kuyper "Recognition: Netherlands Theory and State Practice" in HF Van Panhuys, WP Heere, JW Josephus Jitta, Ko Swan Sik & AM Stuyt (eds.) *International Law in the Netherlands* (Vol. 1, Sijthoff & Noordhoff, Alphen an den Rijn, 1978" (1978) 30 Netherlands International Law Review at 371-403.

⁵ This argument was first made by then Mexican Secretary of Foreign Relations Senor Don Genaro Estrada. According to Phillip Jessup, Estrada believed that recognition involves the assumption of a right to pass critical judgement on the legal capacity of foreign regimes, a right which undermines the sovereignty of the other state See Philip C Jessup "The Estrada Doctrine" (1931) 25 The American Journal of International Law at 721. See also, Cécile Vandewoude "The Democratic Entitlement and Pro-Democratic Interventions: Twenty Years After Haiti?" (2012) 12 Mexican Yearbook of International Law Anuario Mexicano De Derecho Internacional 779 at 781.

⁶ Jean D'Aspremont "Legitimacy of Governments in the Age of Democracy" (2005) 38 NYUJ Int'l. L. & Pol. at 878- 879 argued that "There are no objective approach to determine governments' legitimacy. That means that each state enjoys a comfortable leeway when asked to recognise the power of an entity that claims to be another state's representative in their bilateral intercourse. Each state evaluates foreign governments' legitimacy through the approach that it chooses. International legal relations are therefore replete with situations where a government is deemed legitimate by some states and illegitimate by others."

⁷ For example, the recognition of the Syrian opposition forces by the US as against Russia's policy of non-recognition of the opposition. Another example is the US Government's agreement to military intervention and assistance to the *Contras Force* in Nicaragua. See Nicaragua Case "Case Concerning Military and Paramilitary Activities in and against Nicaragua" (1986) Judgement on the Merits.

practices.⁸ Others contend that the end of the Cold War, which significantly contributed to the formation of unconstitutional regimes, has resulted in a post-Cold War legal order that demands democratic legitimacy as the minimum approach for the recognition of governments in international law.⁹

Before the recent debates on democratic legitimacy, the customary rule governing states' decision on granting recognition was the effective control doctrine.¹⁰ Under this rule, a state can recognise a government based on its level of efficacy, i.e., a putative government's degree of control over a state to the exclusion of other entities.¹¹ However, the view that the effective control doctrine is antithetical to the "self-determination notion of the people" by overtly relying on the concept of control rather than popular acceptance stands as one of its most significant disadvantages.

Also, neither is there a benchmark at the time of recognition, in determining how the putative government would effectively administer the state functions, despite being in control during state conflict.¹² Nor, is there any consideration for an

⁸ Thomas M Franck "The Emerging Right to Democratic Governance" (1992) 86 *The American Journal of International Law* 46 at 46-91. Francis Fukuyama "The End of History?" (1989) 1 *The National Interest* at 3-18, Sean D. Murphy "Democratic Legitimacy and the Recognition of States and Governments" (1999) 48 *The International and Comparative Law Quarterly* at 545-581, Samuel P Huntington *The Third Wave: Democratization in the late twentieth century* (University of Oklahoma Press, 1993) at 31. For an overview of the debate, see Steven Wheatley "The Security Council, Democratic Legitimacy and Regime Change in Iraq" (2006) 17 *European Journal of International Law* at 531-551, Susan Marks "What has Become of the Emerging Right to Democratic Governance?" *European Journal of International Law* (2011) 22 *European Journal of International Law* at 507- 524. Of recent, Erika De Wet "From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition" (2014) 108 *American Journal of International Law* at 201-207 and Obiora Chinedu Okafor "Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet" (2014) 108 *AJIL Unbound* 2, at 228-232.

⁹ Some of these claims are contentious and therefore need to be addressed with caution. See Jean D'Aspremont "The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks" (2011) 22 *European Journal of International Law* 549 at 552. Also, Jean D'Aspremont "Post-Conflict Administrations as Democracy-Building Instruments" (2008) 9 *Chicago Journal of International Law* at 1-17.

¹⁰ Joshua Downer "Towards a Declaratory School of Government Recognition" (2013) 46 *Vanderbilt Journal of Transnational Law* at 583 explains that under the effective control doctrine, the proper government to represent a state in international forums is the one that has authority and control over a vast portion of a state territory and population.

¹¹ Erika De Wet "From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition" (2014) 108 *American Journal of International Law* at 984. According to Erika de Wet, the effective control principle "is based on the fiction that control resembles the population's acceptance of (or at least its acquiescence in) the incumbent government's right to represent the state as a whole.

¹² Christopher J Le Mon "Unilateral Intervention by Invitation In Civil Wars: The Effective Control Test Tested" (2002) 35 *NYUJ Int'l L. & Pol.* at 745.

enquiry into the process by which the government could gain control. In effect, a government that comes into power through coup d'état or any other unconstitutional means would be recognised as legitimate as long as it is in control of the state.

Democratic legitimacy addresses these issues by subjecting the government seeking recognition to rules that are enshrined in national constitutions or through democratic processes. However, relying on democratic legitimacy to determine whom to accord recognition could be problematic for the following reasons: Firstly, there is no unified and acceptable definition of democracy by states.¹³ As Richard Burchill observed, "what it means to be democratic or how democracy manifest in law and practice are issues that have not been adequately investigated by international law."¹⁴ While some academics have cited elections as proof of democracy, applying this approach during internal strife where the standard of constitutionality in a state could be non-existent would be baseless.

Secondly, there is insufficient evidence that undemocratic practices on the part of opposition forces would result in non-recognition, especially in circumstances where human rights are at stake.¹⁵ As will be demonstrated in this study, the promotion of human rights and democratic values by Libya's opposition group (the National Transitional Council of Libyan) prompted its recognition by other states despite its undemocratic origins. Hence, the need to exercise caution and investigate the claims in favour of democratic legitimacy as a suitable and sustainable approach.

1.2. Research Aim and Research Question

The aim of this study and some of the broader issues exemplified in it is concerned with investigating to what extent democratic legitimacy could indeed be a suitable solution to the recognition of government problems and sustainable replacement of the current approach (the effective control doctrine). Further, by using a comparative analysis, the study answers as to whether the modification of the current recognition

¹³ Obiora Chinedu Okafor "Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet" (2014) 108 *American Journal of International Law* at 228-232.

¹⁴ Richard Burchill "The Developing International Law of Democracy" (2001) 64 *The Modern Law Review* at 124.

¹⁵ Vasiliki Saranti "Democratic Legitimacy as a Approach for Recognizing a Government: Towards the Emergence of a Regional Customary Rule in the Americas? A Reply to Professor Erika de Wet" (2014) 108 *American Journal of International Law* at 233-238.

of government approach would serve as a better alternative than the acclaimed democratic legitimacy.

As noted previously, some academics have argued democratic legitimacy as the most suitable approach to the recognition of governments in international.¹⁶ For instance, Sean Murphy explains that “the notions of democratic legitimacy have existed in varying degrees in the practice of recognising states and governments. Not considering this fact would be an unattractive conclusion.”¹⁷ However, Brad Roth contends that democratic legitimacy as an international norm is unpromising because “democracy requires long-term preservation, a fixed global constitutional order that is not available because of the structure of international law and state system.”¹⁸

In Obiora Okafor's view, democratic legitimacy is a source of mischief because states are more interested in installing and recognising friendly regimes than in the democratic nature of a government's climb to power (for example Egypt 2013 and Ukraine 2015).¹⁹

In contributing to the recognition of governments debates, this thesis addresses the following issues:

- Why is the recognition of a government necessary in international law?
- Why is this practice controversial?
- To what degree have states eliminated the recognition of governments controversies?
- Why is democratic legitimacy, and the current effective control doctrine, not the best approach for recognising governments?

¹⁶ See Gregory H Fox & Brad R Roth "Democracy and International Law" (2001) 27 *Review of International Studies* at 330 to 331; Susan Marks "What has Become of the Emerging Right to Democratic Governance?" (2011) 22 *European Journal of International Law* at 507-524 ; Of recent, Erika De Wet "From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition" (2014) 108 *AJIL Unbound* at 201-207 and Obiora Okafor "Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet" (2014) 108 *AJIL Unbound* at 228-232.

¹⁷ Sean D Murphy "Democratic legitimacy and the recognition of states and governments" (1999) 48 *International & Comparative Law Quarterly* at 580.

¹⁸ Brad R. Roth "Whither Democratic Legitimism? Contextualizing Recent Developments in the Recognition and Non-recognition of Governments" (2017) 108 *AJIL Unbound* at 214.

¹⁹ Obiora Okafor "Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet" (2014) 108 *AJIL Unbound* at 228.

- What approach may best suit the recognition of governments and address its controversies?

1.3. Research Methodology

This section presents the research methods of this study and explains why Haiti and Libya are selected as case studies. Also, it elaborates the primary information sources that provided the basis for the argument, assertions, discussions and narrative presented in this study.

1.3.1. Research Methods

The object of analysis in this study is state practice concerning the recognition of governments. As a result, the dominant method in this study is legal doctrinal research. As noted by Terry Hutchinson and Nigel Duncan “doctrinal research provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, and explains areas of difficulty and, perhaps, predicts future development”.²⁰ The usage of this method in this study is of utmost importance because it helps to shape the structure of the whole thesis by identifying the areas of difficulty affecting the recognition of governments in international law, the causes of the difficulty, and also helps predict future solution to the problem.

In order to facilitate the extraction of the most useful and satisfactory information that would address this study research question, a comparative analysis approach was adopted in this study. With the use of this approach, the author is able to empirically explore how and why some contemporary phenomena called with a real-life context occurred. Also, in using this approach, the author can compare the similarities and differences in recognition of governments approaches and identify most variable features of the approaches.²¹

As a result of the need to foster a complete understanding of the different approaches adopted by states in eradicating the recognition of governments problems, interdisciplinary research method confine to the realm of international

²⁰ Terry Hutchinson & Nigel Duncan "Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review at 101.

²¹ Frank Esser & Rens Vliegthart. "Comparative Research Methods" (2017) The International Encyclopaedia of Communication Research Methods at 1-22. Terry Hutchinson & Nigel Duncan "Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review at 101.

relation theory is applied in this study. By selecting this approach²², the study utilises common assumptions and generalisation applied to state practices on recognition from an international relation perspective. The advantage is that, where this study analysis relies on assumptions cannot be explained by legal methodology, interdisciplinary approach (specifically international relations) would provide an account and effect of the customary practices enhancing the analysis.

Also, historical methods were adopted in this study to bridge the gap between traditional and modern doctrines of recognition of governments; this helps to foster an understanding of why some problems originated far back in the Middle Ages and the links between these problems until today.

1.3.2. Case Selection

One of the significant political events that have engulfed the international sphere since Westphalia is the adoption of democracy by states in what became known as the waves of democracy.²³ Dictatorial and unconstitutional governments were either swept away by the waves or saw their tenure challenged by demands for democracy.

During the wave of democracy in the Northern Hemisphere, Haiti, a state in North America stood out as an atypical case study compared to other states because it is the first state where the majority of the states granting recognition collectively abandoned the effective control doctrine. In the international realm, it was also the first state where both state and non-state jointly restored democracy after the unconstitutional overthrow of a government. Haiti stands out as a reference for the end of an epoch with regards to the effective control approach and the first clear example of the emergence and development of the democratic legitimacy approach.

²² Van den Besselaar P and Heimeriks G. (2001). Disciplinary, multidisciplinary, interdisciplinary: concepts and indicators at 705-716 in David M and Wilson C S (eds), *Proceedings of the 8th International conference on Scientometrics and Informetrics* University of New South Wales, Australia. See also, Adams Jonathan, Tamar Loach & Martin Szomszor "Interdisciplinary research: Methodologies for identification and assessment" (2016) *Digital research reports* at 1-7.

²³ These waves were classified into first wave of democracy, second wave of democracy, the third wave of democracy and of recent, the fourth wave of democracy following the Arab Spring. For my details, see John Markoff *Waves of Democracy: Social Movements and Political Change* (Routledge, 2015); Renske Doorenspleet "Reassessing the three waves of democratization" (2000) 52 *World Politics* at 384-406. Michael McFaul "The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Post-communist World" (2002) 54 *World Politics* at 212 to 244.

In the Northern part of Africa and the Middle Arab East, some states were forced to adopt democracy in what became known as the fourth wave of democracy or the Arab Spring.²⁴ Compared to other states that were affected by the waves of democracy, Libya ideally stands out as an example of a state where oppositions were prematurely recognised. Also, it is the only example of a state where oppositions were democratic and of recent became repressive thereby questioning the usefulness of democratic legitimacy as an approach for the recognition of governments in international law. Given the aim of this study is to investigate whether democratic legitimacy can be a suitable approach for the recognition of governments and the replacement of the effective control doctrine, Libya stands out as the central case to answer the research question.

1.3.3. Research Information Sources

The recent debate on democratic legitimacy as a sustainable replacement of the effective control doctrine and the best solution to the recognition of government controversies was the source of motivation for this study. Hence, this study involves the reassessment of the recognition of governments, the approach used for recognising governments and investigation into the use of democracy as the best approach for the recognition of government. As a result, the study adopted historical information written on the recognition of government from books that dates back as far as the sixteenth century, records of actions and speeches that are no longer available from any source other than selective libraries.

As a result of the needs to analyse the suitability of democratic legitimacy, this study initially engaged in the analyses of the Libya revolution in relation to state recognition of the National Transitional Council of Libya against the incumbent government of President Muammar al-Ghaddafi. However, since 2015, Libya has been at war with two governments in control, and one internationally recognised by states. Due to the lack of academic publications on the current war situation in Libya, the press releases of national and international news institutions that include assertions and assumptions relied upon in this study.

²⁴ Michael McFaul "The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Post-communist World" (2002) 54 World Politics at 212 to 244.

Primary and secondary sources were also relied upon in this study. Some of the information was obtained from United Nations websites; others were sourced from the internet, published journals, treaties, resolutions, statutes, judicial pronouncements, leading texts, legal reviews and articles. Also, the author had the privilege to speak with some scholars who are specialists in the area of the recognition of government and the use of democratic legitimacy as an approach for recognising governments. Besides this, the author has followed discussions between contemporary researchers and the most well-known academics who are significant contributors to the on-going debates the recognition of governments on online platforms such as EJIL Talk and *Opinio Juris*.

A significant part of this study relied on customary international law derived from state practices in the domestic jurisprudence of each state. Given the limitation in Judicial publication on recognition of government matters by some the states and the historical nature of recognition of government, administrative and judicial decisions that clarify the importance of recognition of governments in international law is limited in this study. A solution for their presentation in this study to selectively relied on the most significant judicial decisions from the United Kingdom and the United States of America.

1.4. Research Structure

Chapter Two examines the recognition of governments in international law. The central question in this Chapter is whether recognition of governments is of any importance in international law to warrant its continuation. In answering this question, the Chapter reviews the purpose of recognition of government. As to whether the recognition of a government is vital to international law, the Chapter argues in the affirmative by discussing the importance of recognition of governments to states and international law. A range of examples, including the protection of state sovereignty and the deterring of unconstitutionality such as military coup and revolutions, were discussed.

Chapter Three was divide into three sections. The first section examines the controversies surrounding the recognition of governments in international law, namely the problem of distinguishing between the recognition of states and governments. The second section discusses the difficulty of differentiating between

the political and legal act of government recognition, and the third section addresses the confusion that arises as a result of the use of unclear and ambiguous recognition of government terminologies. The Chapter concluded that the lack of an objective approach is the cause of the recognition of government controversies.

Chapter Four examines the various attempts by states to address the controversies surrounding the recognition of governments in international law. It considers the degree to which some approaches are unsuitable and argues that while some approaches are appropriate in certain situations, they are inadequate in others due to factors such as the tendency to violate a state's autonomy or infringe on citizen's self-determination.

Chapter Five adopts the use of comparative analysis to answer the research question on whether democratic legitimacy is the best solution and would be a sustainable replacement of the effective control doctrine. The similarities and differences between the effective control doctrine and democratic legitimacy were investigated in order to achieve the Chapter objectives. After that, a case study analysis of Haiti (1991) and Libya (2011 till 2019) were conducted to identify the sustainability of democratic legitimacy.

Chapter Six makes recommendations on the rational approach (modified effective control control) that may best suit the recognition of governments and address its controversies based on results adduced from the comparative analysis of the effective control doctrine and the other recognition of government approaches. The Chapter concluded that the modification of the current effective control doctrine to include a rebuttable presumption of consent would be a better and sustainable solution.

Chapter Seven reports the findings of this study, implications, future directions, and limitations encountered during the study.

1.5. Research Terminology

This section explains the various terminologies used for this study because of the confusion that may arise as a result of multiple linguistic meaning in some of the terms, what they entail and their application in this study.²⁵ For instance, there is considerable variation in the meaning of recognition because of the lack of an acceptable definition. In effect, the meaning of recognition varies among states and connotes different linguistic meaning such as acknowledgement, acceptance and consideration. Due to the need to achieve a coherent overview of this study and ensure that the reader understands the essence of this study, the below section explains the following definition of terms as used in this study:

1.5.1. Recognition of Government

The definition of a recognised government remains challenging international law. According to Stefan Talmon, this is due to the “nebulous nature of the term ‘recognition’ and the lack of any clear definition of what constitutes recognition.”²⁶ Annie Schuit explains that inconsistency in state practices and the lack of a treaty definition of what constitutes a recognised government resulted in the current ambiguity.²⁷ Be that as it may, AM Greig defines the recognition of governments as the process by which “one state accepts a new regime as representing another state in international intercourse and, renews relations accordingly.”²⁸ While Stefan Talmon states that it refers to “indication of the willingness or unwillingness of a government to establish or maintain an official relationship with another.”²⁹

In Malcolm Shaw’s view, recognition of a government implies “the acceptance by the government of another, of the opinion that a government fulfils certain conditions and that as a result of the conditions the recognising state will deal with

²⁵ Chapter 3 of this study explains in detail some of the confusion that may arise and the effects of these confusion on a government.

²⁶ Stefan Talmon *Recognition of Governments in International Law: with Particular Reference to Governments in Exile* (Clarendon Press, Oxford, New York, 1998) at 23.

²⁷ Anne Schuit "Recognition of Governments in International Law and the Recent Conflict in Libya" (2012) 14 International Community Law Review at 383.

²⁸ AM Greig "The Effects in Municipal Law of Australia's New Recognition Policy" 11 (1984) Australian Yearbook of International Law at 33.

²⁹ Stefan Talmon *Recognition of Governments in International Law: with Particular Reference to Governments in Exile* (Clarendon Press, New York, 1998) at 23.

the government and accept the legal consequence of the act.”³⁰ This study adopts the American Restatement definition of the recognition of governments as “the formal acknowledgement that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of the state.”³¹ The reason for this selection is because in the most literal sense, acknowledging a government as the authorised holder of a state implies acceptance of the government. Also, unlike other definition put forward by academics and states, in the Restatement definition, there is a "commitment to treating a regime as the government of the state." It is from this commitment that rights and privilege could be accord to a recognised government. Chapter 2 of this study thoroughly discusses this topic.

1.5.2. Legitimate Government

As noted by Awol Kassim, “international law does not provide for parameters that help determine a ‘legitimate government’ or a government with the ‘legal authority’ capable (legally and factually) of speaking on behalf of the state.”³² Despite several attempts to address this issue, this area of law remains problematic due to the multifaceted nature of legitimacy.³³ Thomas Franck defines legitimacy as, “the quality of a rule, or a system of rules or a process of making or interpreting rules that pull both the rule makers and those addressed by the rules towards voluntary compliance.”³⁴ However, these do not offer a normative definition of what constitutes a “legitimate government”.

Opinion with regards state practice has also been inconclusive and divided. For instance, the United States (US) justified its intervention in Panama by stating that it acted with the approval of the lawful and democratic government of Panama thus

³⁰ Malcolm N Shaw *International Law* (Cambridge University Press, UK, 2008) at 454.

³¹ The Restatement (Third) of the Foreign Relations Law of the United States comment 203 (a), 204. See also Mary Beth West & Sean D Murphy "The Impact on U.S. litigation of Non-Recognition of Foreign Governments" (1990) 26 *Stanford Journal of International Law* at 438.

³² Awol Kassim Allo "Counter-Intervention, Invitation, Both or Neither? An Appraisal of the 2006 Ethiopian Military Intervention in Somalia" (2009) 3 *Mizan Law Review* at 216.

³³ Various attempted solutions fail to address “whom and what” constitutes a legitimate government. Jean D' Aspremont "Legitimacy of Governments in the Age of Democracy" (2006) 38 *New York University Journal of International Law and Politics* at 877-887.

³⁴ Thomas Franck "The Emerging Right to Democratic Governance" (1992) 86 *American Journal of International Law* at 51.

implying that it received an invitation from the latter.³⁵ However, Malcolm Shaw contended that the US notion of “lawful and democratically elected” runs counter to international law’s concept of a legitimate government. He stated that in international legal context, a government is legitimate if it can control the majority of its citizens and administration effectively, regardless of whether it is democratic, socialist or otherwise.³⁶

Raymond Trevor argues and concurs that “a legitimate government is a government in effective control of a state and ceased to be a valid government as soon as it loses its efficacy.”³⁷ It follows from Trevor and Shaw’s arguments that recognition is granted based on a government level of efficacy.³⁸ Therefore, the phrase legitimate government is used earlier in this study to connote a government that is recognised based on being in effective control of a state. However, as this study advances to Chapter Five, this definition would not suit its purpose in this study. Hence, a new definition will be put forward to meet the overall objective of this thesis.

1.5.3. Democracy

The word democracy emerged from the Greek phrase *demo* (people) and *Kratos* (rule), democracy, therefore, implies a form of governance based on the people’s rule.³⁹ As simple as this sounds, it is one of the most elusive concepts in political theory because what constitutes “people” is contentious given that it may refer to specific and non-specific sets of people based on ethnicity, race, sex or colour. Furthermore, Jure Vidmar notes that the term ‘rule’ is hard to define given that governance is no longer a question of “who rules”, but, “how people exercise their rule”.⁴⁰ Hence, there is no universal definition of democracy.⁴¹ Samuel Huntington argues that, as a form of government, “democracy can be defined in terms of sources

³⁵ Malcolm Shaw *International Law* (Cambridge University Press, Cambridge, 2003) at 1042.

³⁶ Malcolm Shaw *International Law* (Cambridge University Press, Cambridge, 2003) at 1042.

³⁷ Trevor Redmond “Power to the People-Intervention to Restore Democracy” (2004) 12 ISLR at 5

³⁸ See Hans Kelsen *General theory of law and state* (The Lawbook Exchange, 1945) at 220-221. Hans Kelsen believed that a legitimate government is one that is efficaciously in control of a state. He argued that the process through which that government comes into power is irrelevant to international law.

³⁹ Josiah Ober “The Original Meaning of Democracy: Capacity to do Things, not Majority rule.” (2007) *Princeton/Stanford Working Papers in Classics Paper* 090704 at 2.

⁴⁰ Jure Vidmar *Democratic statehood in international law: The emergence of new states in post-cold war practice* (Bloomsbury Publishing, 2013) at 15.

⁴¹ Obiora Chinedu Okafor “Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet” (2014) 108 *American Journal of International Law* at 228-232

of authority for government, purposes served by government and procedures for constituting governments.”⁴² However, this is ambiguous as the “source of authority” may originate from a democratic, undemocratic or authoritarian process.

To address this issue, Joseph Schumpeter’s classical theory of democracy argued that, as a source of authority, it should originate from the “will of the people” based on the “common good”.⁴³ According to him, this can be attainable through an institutional arrangement in which individuals arrive at political decisions through power acquired by competing for the people’s vote through the electoral process.⁴⁴ In support, David Beetham claimed that democracy is attainable through popular control and collective decision making.⁴⁵ He stated that “the core idea of democracy is popular vote or popular will over collective decision-making. Its starting point is the citizen rather than the institutions of government.”⁴⁶

In line with recent state practices, the definition of democracy put forward by Joseph Schumpeter is adopted in this study to connote a government that is formed by the ‘popular will of the people’ expressed through a process which is also agreed upon or acceptable by the majority of the people. Chapter Five of this study thoroughly discuss the justification for this adoption.

1.5.4. Democratic Legitimacy

Francis Fukuyama’s “End of History”⁴⁷ and Samuel Huntington’s “Third Wave of Democracy”⁴⁸ led many international law academics to believe in democracy as “the *sine qua non* to validate governance.” However, not until, Thomas Franck’s publication in 1992 of an “emerging right to democratic governance” did the use of democracy as a means of recognising governments gain traction in international law.⁴⁹ Two events led up to these, the August Coup in the Soviet Union that could

⁴² Samuel Huntington *The Third Wave: Democratization in the late twentieth century* (University of Oklahoma press, 1993) at 6.

⁴³ Joseph A Schumpeter *Capitalism, Socialism and Democracy* (Routledge, 2013) at 250.

⁴⁴ Jure Vidmar *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Bloomsbury Publishing, 2013) at 16.

⁴⁵ David Beetham *Democracy and human rights* (Polity Press, Cambridge, 1999) at 90-91.

⁴⁶ At 91.

⁴⁷ Francis Fukuyama, “The End of History?” (1989) 16 *The National Interest* at 3-18

⁴⁸ Samuel Huntington *The Third Wave: Democratization in the late twentieth century* (University of Oklahoma press, 1993) at 46.

⁴⁹ Thomas Franck “The Emerging Right to Democratic Governance” (1992) 86 *American Journal of International Law* at 46-91.

have led to the overthrow of President Boris Yeltsin was halt, and in Haiti President Jean Bertrand Aristide candidacy was restored after a successful coup.⁵⁰ In both instances, the international community vigorously defended democracy as the only means of validating governance. These led to the debate on the suitability of democratic legitimacy as an approach for the recognition of governments in international law.

During the debate that followed, four justifications were articulated in support of democratic legitimacy. The first was that as a means of preventing internal armed conflict, democracy is increasingly being accepted by states and international organisations because it “addresses the exclusionary politics lying at the heart of civil conflicts.”⁵¹ Secondly, democracy was asserted as the key to peace and international security because democratic states do not wage war against one another.⁵² Thirdly, a wide range of international norms and practices not related to democracy, now rely on democracy or democratic processes for their implementation.⁵³ Finally, the commitment to the democratic principles of choice, transparency and pluralism was claimed as essential to protect human rights.⁵⁴ While some of these claims have proven correct, others raise controversial issues that Chapter Five of this study will examine.⁵⁵

⁵⁰ Thomas Franck "The Emerging Right to Democratic Governance" (1992) 86 American Journal of International Law at 54.

⁵¹ Fox, Gregory H., and Brad R. Roth, eds. *Democratic governance and international law* (Cambridge University Press, 2000) at 7.

⁵² Michael Edward Brown, et al. *Debating the Democratic Peace* (MIT Press, 1996) at 58.

⁵³ Remarks of Gregory Fox in Karen Ann Widess "Implementing democratization: What role for international organizations?" (1997) American Society of International Law Proceedings of the Annual Meeting at 360-22.

⁵⁴ Benjamin Constant *The Liberty of the Ancients Compared with that of the Moderns* (Cambridge: Cambridge University Press, 1988).

⁵⁵ For instance, Brad Roth contends that “democratic legitimacy as an international norm is unpromising, and a potential source of mischief as a unilateralist initiative. According to Roth, “the international system is often shadowed with multiplicity of conflicting interests and conflict political moralities, where implementers of supposed universal values are untrusted and often untrustworthy. Chapter 7 of this thesis examines Roth’s claims by analyzing the basis for the recognition of the NTC when Muammar Gaddafi was still in effective control of Libya. See, Brad Roth "Whither Democratic Legitimism? Contextualizing Recent Developments in the Recognition and Non-recognition of Governments" at 218. While, Sean Murphy asserts that “the notions of democratic legitimacy have existed, to varying degrees, in the practice of recognising states and governments. Not considering this fact would be an unattractive conclusion. See, Sean Murphy "Democratic legitimacy and the recognition of states and governments." (1999) *International & Comparative Law Quarterly* at 581.

1.6. Research Gaps

Every scholars study aims to contribute to knowledge by either creating research questions for future reviews or proposing solutions to a research problem that has not been addressed.⁵⁶ Therefore, a research study must identify and fill the knowledge gaps in its field of study.⁵⁷ This study's contribution to knowledge is by answering whether democratic legitimacy could be a suitable replacement of current recognition of government approach in international law, this is a worthy contribution considering the on-going debate on this topic.

Currently, there are limited publications and materials on the recognition of governments in international law. Most publications on recognition to date tend to focus on either the recognition of states or the joint publication of recognition of states and governments with a limited focus on the recognition of governments in international law. Even when the recognition of governments is addressed by some of the publication, an in-depth discussion of some of the topics dealt with in this study are overlooked due to the murky nature of the topic. This study will, therefore, be useful for future research relating to the recognition of governments, effective control doctrine and democratic legitimacy.

This study analyses the causes as well as proffers solutions to problems surrounding the recognition of governments in international law. It examines the benefits of recognition and the negative impact of non-recognition. These help in the understanding of recognition of government, its significances, and how some problems emerged. Further, the study offers insight into the operational issues that may arise due to arbitrary decisions. State policies concerning the recognition of governments were examined against some benchmark. Also, the democratic legitimacy theory and the effective control doctrine were observed in line with similar approach to detect similarities, differences, and why some approaches failed. The study thus provides information on state practices regarding the recognition of governments approach.

⁵⁶ Judith Haber "Research Questions, Hypotheses, and Clinical Questions" (2014) *Nursing Research: Methods and Critical Appraisal for Evidence-Based Practice* at 30-35.

⁵⁷ Andrew H Van de Ven & Paul E Johnson "Knowledge for theory and practice" (2006) 31 *Academy of Management Review* at 804.

In conclusion, the author expects that this research will extend the debate on democratic legitimacy and the recognition of governments in international law. The significance of this choice is evident in Chapter Five of this study, where the researcher discusses democratic legitimacy barriers with regards to the non-recognition of the Front for the Advancement of the Haitian People in Haiti (1992) and the recognition of the transitional government of Libya (2011).

1.7. Conclusion

The lack of an objective approach guiding the recognition of government processes at the international level has caused much problems and raised questions about the usefulness of recognition of governments practice in international law. States have adopted different approaches to resolve the problems, many of, which have been short-lived, inadequate, unsustainable, and unsuitable. Recently, some academics assert that the decision to recognise a new government should be based on democracy rather than the ability of the government to meet the current criterion of effectiveness. This study assesses this claim and argues for the modification of the current recognition of government approach against the acclaimed democratic legitimacy approach.

Chapter Two: Recognition of Governments in International Law

2.1. Introduction

The definition of what constitutes a recognised government in international law remains challenging. Much of these arise as a result of different state practices and the lack of treaty provisions establishing what constitutes a recognised government in international law.⁵⁸ Nevertheless, the United States of America reinstatement defines the recognition of government as "the formal acknowledgement of a particular regime as the effective government of a state and implies a commitment to treat that regime as the government of the state."⁵⁹ This definition implies the acceptance of a regime as the authority of a state and the pledge to accord its certain rights and privilege.

Development in these two areas (acceptances of a regime and commitment to the regime) has resulted in the recent debates, which raises the question of whether recognition of governments performs any useful function in the international system? The aim of this Chapter is to answer this question. In so doing, this Chapter historically examines the rationale behind the recognition of governments in international law, discuss the essential purpose of recognition of governments and the effects of non-recognition on a government.

2.2. The Rationale behind the Recognition of Governments

Historically, the need to recognise a government as the authority holder of a state did not arise in international law until the Middle-Ages because of the need to affirm the Papal Supremacy.⁶⁰ During this era, polities such as small fiefdoms and free cities existed under a provincial structure similar to the modern states system under the leadership of the Pope and Emperor who were the great powers of the era.⁶¹ For a

⁵⁸ Anne Schuit "Recognition of Governments in International Law and the Recent Conflict in Libya" (2012) 14 International Community Law Review at 382.

⁵⁹ The Restatement (Third) of the Foreign Relations Law of the United States comment 203 (a), 204. This definition can also be found in Mary Beth West & Sean D Murphy "The Impact on U.S. litigation of Non-Recognition of Foreign Governments" (1990) 26 Stanford Journal of International Law at 438.

⁶⁰ Prakash Menon *The Law of Recognition in International Law: Basic Principles* (Edwin Mellen Press, 1994) at 1. See Also, Arthur Nussbaum *A Concise History of the Law of Nations* (Macmillan, 1954) at 24, 25.

⁶¹ However, there are different features. While the modern state system is characterised by organised entities, internal maturity, civilisation, defined territory and mixed populations medieval provincial entities were characterised by unorganised governance, underdevelopment, and a lack of internal

polity to become a member of the Papal States, its ruler had to be recognised. This act reflected the Papacy's acceptance of a ruler as a political leader and also upheld the Pope's authority as supreme.⁶²

The question of superiority did not arise between the Emperor and the Pope because each authority was independent and sovereign.⁶³ However, the unification of the church in the Middle-Ages under the principle of *unitas ecclesia* resulted in all the Papal States and other separate polities being brought together under the same authority.⁶⁴ It led to the enactment of conflicting laws, political strife and tussles for supremacy between the Pope and Emperor.⁶⁵ Grewe Wilhelm observes that "where one power felt supreme in adjudicating problems by his office as a spiritual authority, the other, in contrast, felt supreme as a secular authority by political developments."⁶⁶

The conflict resulted in eighteen years of civil conflict that ended with the ratification of the Treaty of Venice in 1177 (also known as the Peace of Venice) which brought an end to the supremacy conflict by the affirmation of the Pope as sovereign over the Emperor in spiritual and temporal matters.⁶⁷ However, this was short-lived because of secularism and the unifying influence of the Emperor that was back by increasing political and social developments.⁶⁸ The rise of Protestantism, coupled with the development of nation-states such as France, England and Spain, led to the collapse of the Papal authority.⁶⁹ It gave rise to 30 years of political and religious war that ended with the signing of the Treaties of Munster and Osnabruck, commonly

maturity and could thus not be regarded as states. These entities centered on specific characteristics such as religion, language, culture, or tribal formations.

⁶² Wilhelm G. Grewe "The Epochs of International Law (Trans. Michael Bryers, Berlin, 2000) at 76.

⁶³ Arthur Nussbaum *A Concise History of the Law of Nations* (The Macmillan Company, New York, 1947) at 23.

⁶⁴ Arthur Nussbaum *A Concise History of the Law of Nations* (The Macmillan Company, New York, 1947) at 23.

⁶⁵ Wilhelm G. Grewe "The Epochs of International Law (Trans. Michael Bryers, Berlin, 2000) at 43.

⁶⁶ At 43.

⁶⁷ Thomson Rodney M "An English Eyewitness of the Peace of Venice, 1177" (1975) 50 *Speculum*. at 21.

⁶⁸ Shaw Malcolm *International Law* (Cambridge University Press, Cambridge, 2003) at 18

⁶⁹ Arthur Nussbaum *A Concise History of the Law of Nations* (Macmillan 1954) at 52.

referred to as the Peace of Westphalia.⁷⁰ In describing the importance of the Westphalia Treaty to the newly formed states, Gross asserts that:⁷¹

The Westphalia Treaty marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterised by the coexistence of a multiplicity of states, each sovereign within its territory, equal, and free from any external earthly authority.

The idea of authority above the sovereign states was no longer in existence. Instead, what took precedence was the right of sovereigns to govern their peoples free of outside interference.⁷² The Westphalia Treaty marked an end of an epoch of European political entities established by the authority of the papacy and the beginning of one where the principle of sovereignty took precedence in state relations.⁷³ To achieve political equilibrium among states and move away from the universal monarchical system of Papal authority, the Westphalia Treaty bestowed significant power on states.⁷⁴ With the power to enter into legal relations in the name of the states, the electors were recognised as the lawful representative of the newly formed states.⁷⁵ Bruce Russett and Harvey Starr explain that:⁷⁶

The end of the Thirty Years War brought with it the end of the medieval Holy Roman Empire. Authority for choosing the religion of the political unit was given to the prince of that unit and not to the Hapsburg Emperor or the Pope. No Longer could one pretend there was a religious or political unity in Europe. Authorities were dispersed to the various kings and princes, and the basis for the sovereign state was established.

The Westphalia Treaty forms the *Jus Foederationis* and the foundation for the recognition of states and governments in international law.⁷⁷ As the newly formed state system developed, questions began to arise on the usefulness of recognising

⁷⁰ Derek Croxton "The Peace of Westphalia of 1648 and The Origins of Sovereignty" (1999) 21 The International History Review. at 570. The Peace of Westphalia was a bilateral Peace Treaty based on the sovereign equality of states in contrast to the Papal structure of one sovereign authority.

⁷¹ Leo Gross "The Peace of Westphalia, 1648-1948" (1948) 42 The American Journal of International Law at 28-29.

⁷² Stéphane Beaulac "The Westphalian model in defining international law: challenging the myth" (2004) 8 Austl. J. Legal Hist. at 183.

⁷³ Claire Cutler "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A crisis of Legitimacy" (2001) 27 Review of International Studies at 134.

⁷⁴ Leo Gross "The Peace of Westphalia, 1648-1948" (1948) 42 The American Journal of International Law at 28-29.

⁷⁵ JG Starke "Recognition at International Law" (1950) 22 The Australian Quarterly at 13. see also, David Kinsella, et al. *World Politics: The Menu for Choice* (Cengage Learning, 2012) at 47.

⁷⁶ Bruce Russett and Harvey Starr, *World Politics: The Menu for Choice* (San Francisco, 1981) at 47.

⁷⁷ Franca-Filho Marcilio-Toscano "Westphalia: a Paradigm? A Dialogue Between Law, Art, and Philosophy of Science" (2007) The German Law Journal at 995.

the state representatives who were now called government. The following sections address this debate.

2.3. The Recognition of Governments Debates

In the previous section, it was established that the rationale behind the recognition of government was to affirm the supremacy of the Pope. However, this outgrew its purpose because of the development of the modern state system in the seventeenth century. From the eighteenth century until today, the question that arises at the international realm and in particular among academics is whether the recognition of governments serves any useful purpose in international law.⁷⁸ These debates centered, on the fact that some states have abandoned the practice of recognising governments and the consequence of non-recognition on a government is relatively narrower.⁷⁹ As such, the functions of a recognised government can easily be performed by other apparatus such as diplomats and consular mission. However, some circumstances make these claims less desirable. For example, not all states have

⁷⁸ For an overview of this debate, a detailed analysis of the problems created by the recognition of governments and why such recognition should be sustained, see Martha Peterson "Recognition of Governments Should Not Be Abolished" (1983) 77 *The American Journal of International Law* at 31. Apart from Peterson, the following academics analyse the problems relating to recognition of governments, their causes and their implication for the status of a government: David Ernest Hudson "Recognition of Foreign Governments and Its Effect on Private Rights" (1936) 1 *Mo. L. REv.* at 312 – 326. See also, Thomas Galloway *Recognizing Foreign Governments: The Practice of the United States* (American Enterprise Institute 1978) at 3. For example, JJ Lador-Lederer "Recognition-A Historical Stocktaking (Part I)" (1957) 27 *Nordisk Tidsskrift Int'l Ret.* at 62 questions whether the recognition of states and governments belongs to international law. He discusses the judicial problems surrounding the recognition of governments using two theories of recognition, constitutive and declaratory. Hersch Lauterpacht "Recognition of Governments: I" (1945) 45 *Columbia Law Review* at 815 to 864 identifies the controversial problem of distinguishing between the legal and political views of recognition of governments. Obed Y Asamoah "Recognition of States and Governments" (1968) 5 *University of Ghana Law Journal* at 123 to 132 was of the view that the confusion surrounding the recognition of governments was the result of "different and hypocritical state practice and the attempts of textbook writers to construct coherent theories of recognition which are possible only through arbitrary selection of evidence." Gregory H Fox & Brad R Roth *Democratic Governance and International Law* (Cambridge University Press, 2000) at 121 to 196. See also, Sean D Murphy "Democratic Legitimacy and the Recognition of States and Governments" (1999) 48 *International and Comparative Law Quarterly* at 545 to 581, Joshua Downer "Towards a Declaratory School of Government Recognition" (2013) 46 *Vanderbilt Journal of Transnational Law* 581. Robert D Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 *Emory International Law Review* at 112-113. See also, Pieter Kuyper, Pieter Kuyper "Recognition: Netherlands Theory and State Practise" in HF Van Panhuys, WP Heere, JW Josephus Jitta, Ko Swan Sik & AM Stuyt (eds.) *International Law in the Netherlands* (Vol. 1, Sijthoff & Noordhoff, Alphen an den Rijn, 1978" (1978) 30 *Netherlands International Law Review* at 371 to 403.

⁷⁹ Martha Peterson "Recognition of governments should not be abolished" (1983) 77 *American Journal of International Law* at 31-50.

diplomatic relations. At present, there are no diplomatic relations between the United States of America and Iran.⁸⁰ Even if diplomatic relations exist, not all states maintain diplomatic missions in other states. For instance, Nigeria does not have a diplomatic mission in New Zealand. Instead, consular matters relating to New Zealand and Nigeria are addressed by Nigeria consulate in Australia.⁸¹

Secondly, it was argued that structurally, recognition of governments is based on the discretionary decisions of states as a matter of their policy and political expediency rather than on international law rule.⁸² As such, states decisions on recognition of government matters varies and often contains elements of inconsistencies that often results in the replete situation of a government been consider as constitutional by some states and unconstitutional by others, thereby creating unnecessary confusions.⁸³ For example, in the 1992 usurpation of the candidacy of President Jean-Bertrand Aristide, the Haitian opposition (FRAPH) were not recognised despite having the sufficient requirement for the effective control rule. Meanwhile, states went ahead with the recognition of Libya opposition (NTC) as the legitimate representative of Libyans despite the NTC, not meeting the requirements of the effective control rule which is the customary approach adopted by most states when recognising governments.⁸⁴

⁸⁰ Afshon Ostovar, The U.S. and Iran Are Marching Toward War Can They Find a Solution Before It's Too Late? *Foreign Affairs* <<https://www.foreignaffairs.com/articles/iran/2019-06-28/us-and-iran-are-marching-toward-war>>

⁸¹ Consular matters relating to Nigeria are address by the Nigeria Consular in Australia <<https://www.mfat.govt.nz/en/countries-and-regions/africa/nigeria/high-commission-for-the-federal-republic-of-nigeria/>> accessed on 25 August 2019.

⁸² Brad Roth "Whither Democratic Legitimism? Contextualizing Recent Developments in the Recognition and Non-recognition of Governments" 2014 108 *American Journal of International Law* at 214.

⁸³ Failed attempts by some states and academics have led to calls for the eradication of this practice in international law. Among these academics was Judge Baxter, who asserts that "*an institution of law that causes more problems than it solves must be rejected and replaced by working arrangements that are flexible and realistic. The partial withdrawal of law from this area of international relations will facilitate the maintenance of relations with states in which extra-constitutional changes of government are taking place, and that in itself is a good thing.*" Thomas Galloway *Recognizing Foreign Governments: The Practice of the United States* (American Enterprise Institute, 1978).

⁸⁴ The United Kingdom foreign secretary, William Hague declared that: he Prime Minister and I have decided that the United Kingdom recognises and will deal with the National Transitional Council as the sole governmental authority in Libya. This decision reflects the NTC increasing legitimacy, competence, and success in reaching out to Libyans across the country. Through its actions, the NTC has shown its commitment to a more open and democratic Libya - something that it is working to achieve through an inclusive political process. This is in stark contrast to Gaddafi, whose brutality against the Libyan people has stripped him of all legitimacy. After Hague's declaration, The United Kingdom accredited a

Thirdly, some academics claimed that the political arbitrariness of many recognition decisions often results in problems.⁸⁵ What makes this situation untenable is that an unrecognised government cannot sue or enforce judicial action on a deciding state on the basis that it refused recognition.⁸⁶ The reason being, there is no objective approach to determine governments' recognition.⁸⁷ Hence, each state enjoys a comfortable leeway when asked to recognise, i.e. each state evaluates a foreign governments' legitimacy based on its approach. In effect, hosts of recognition of government decisions are made by states without any form of accountabilities. The general implication of this is the use of recognition for other means than its purpose.⁸⁸

A range of examples are evident in some state practices; for example, the recognition of the Huertas government in Mexico by the United States government was conditional. The consensus was that the regime, upon recognition, would settle the long-standing disagreement concerning the Chamizal boundary and equitable distribution of Colorado.⁸⁹ Similarly, in 2012, elements of the Syrian opposition known as the National Coalition of Syrian Revolutionary and Opposition Forces (NCSROR) were prematurely recognised by the United States of America,⁹⁰ the United

NTC appointed Ambassador as the Libya ambassador to the United Kingdom in London. The United Kingdom government then unfroze the assets of the Arabian Gulf Oil Company, a Libya oil company whose assets were frozen during the Libya conflict.⁸⁴ This benefited the NTC in the sale of Libya crude oil and encouraged other states in the declaration and recognition of the NTC as the legitimate representative of Libya see Sam Halabi "Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context" (2012) 27 American University International Law Review at 321-24.

⁸⁵ For example, the recognition of Syria oppositions by the United States of America as against Russia policy of non-recognition of the opposition. Another example is the United States Government granting of military intervention and assistance to the *Contras Force* in Nicaragua See Nicaragua Case "Case Concerning Military and Paramilitary Activities in and against Nicaragua" (1986) Judgement on the Merits. Another example is the pre-mature recognition of the Libya opposition group, the NTC while the incumbent regime Was still in effective control of Libya.

⁸⁶ Robert Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory International Law Review at 121.

⁸⁷ Jean D'Aspremont "Legitimacy of Governments in the Age of Democracy" (2005) 38 NYUJ Int'l. L. & Pol. 877 at 878-9.

⁸⁸ The use of recognition for unwilling promise is a common practice among states such as the United States of America. For instance, Mexico refuse its bargain of the secure oil rights for exchange of recognition. Martha Peterson "Recognition of Governments Should Not Be Abolished" 1983 77(1) The American Journal of International Law 31 at 39.

⁸⁹ Martha Peterson "Recognition of Governments Should Not Be Abolished" (1983) 77 The American Journal of International Law at 31-39

⁹⁰ Nour Malas & Jay Solomon "U.S. Formally Recognizes Syria's Main Rebel Group" *The Wall Street Journal* <<http://www.wsj.com/articles/SB10001424127887324339204578173272657834096>> Also see, Asaad Al-Saleh & Loren White "Dissecting an Evolving Conflict: The Syrian Uprising and the

Kingdom,⁹¹ the Arab League and the Gulf Cooperation Council.⁹² The premature recognition of Syrians opposition came against the background assertions of some states needs to effect political transitions in Syria, and the needs for unfettered and safe access for humanitarian agencies.⁹³

Fourthly, some states contend that the recognition of governments practice infringes on sovereignty. These arguments were tender in two ways; firstly, the denial of recognition to a government that has the necessary competency to be regarded as the lawful representative of a state would be nothing else but the violation of the autonomy of the state.⁹⁴ Also. It could be argued as the deprivation of a state right to statehood since an effective government is a criterion for statehood.⁹⁵ Secondly, the denial of recognition to a government means infringements on the political self-determination of citizens of the state to choose their government.⁹⁶ Better still, it

Future of the Country" (2013) Institute for Social Policy and Understanding and the New American Foundation. at 192.

⁹¹ Richard Spencer "Britain Officially Recognise New Syrian Rebel Coalition as Countries 'Legitimate Government'" *The Telegraph* 5 <<http://www.telegraph.co.uk/news/9691319/Britain-officially-recognises-new-Syrian-rebel-coalition-as-countrys-legitimate-government.html>>.

⁹² In 2013, the chief of Syria's *Jab hat al Nusra* Front, part of the Syria opposition group known as the Free Syrian Army purporting to represent the self-determination of the Syrians was sighted paying allegiance to the al-Qaeda terrorist group, this same group were initially granted recognition as the representative of Syria by the United States, which has now withdrawn its recognition. See Syria: BNP leader Griffin says opposition dominated by 'jihadi terrorists' 03 Mar. 2013 <<http://www.bbc.co.uk/news/uk-politics-22860844>> See also, Syrian Rebels Pledge Loyalty to Al-Qaeda 03 Mar. 2013 <<http://www.freep.com/article/20130614/NEWS15/306140065/Syrian-rebels-pledge-loyalty-to-al-Qaeda>>, UN SC A/RES/67/262 4 June 2013, the situation in the Syrian Arab Republic. See also, Security Council Press Statement on Attacks against Civilians in Syria 06 Mar. 2015 <<http://www.un.org/press/en/2015/sc11921.doc.htm>>.

⁹³ The United Kingdom was noted to affirm that " Britain has formally recognised the newly 'United Syrian opposition' as the sole legitimate representative of the Syrian People...I have sought and received significant and encouraging assurances from the new National Coalition for Syrian Revolutionary and Opposition Forces on agreeing on a detailed political transition plan for Syria. As well as showing a clear commitment to human rights and international humanitarian law, including the protection of religious communities and unfettered and safe access for humanitarian agencies. Few days later, the United States of America declared that "We've made a decision that the Syrian Opposition Coalition is now inclusive enough, is reflective and representative enough of the Syrian population that we consider them the legitimate representative of the Syrian people in opposition to the Assad regime and so we will provide them recognition and obviously, with that recognition comes responsibilities."

⁹⁴ Thomas Ann Van Wynen & Thomas Aaron Joshua *Non-intervention: The Law and its Import in the Americas* (Southern Methodist University Press, 1956) at 244.

⁹⁵ Ian Brownlie *Principles of public international law* (Oxford University Press, 1990) at 689.

⁹⁶ Thomas Ann Van Wynen & Thomas Aaron Joshua *Non-intervention: The Law and its Import in the Americas* (Southern Methodist University Press, 1956) at 244. This argument is based on selective approach of states in the recognition of government processes. See Chapter five and six discussion for full explanation.

could be affirmed as questioning the independence of the citizens of that state to choose their government.⁹⁷ This argument is premised on the view that self-determination rights of citizens to choose their government lies on the core end of the recognition of government and implies an arena of rights that are not political but, legal.

Fifthly, since the induction of the United Nations Charter, specifically Article 2 (7) of the United Nations Charter and the Friendly Relations Declaration (UN General Assembly, 1970) it has become an established principle of international law that no states or group of states has the right to interfere for whatsoever reason in the internal or external affairs of other states. An enquiry into the constitutionality of a government in terms of how it came into power before recognition, no longer tenable in international law because it is considered to be a violation of sovereignty. Therefore, the usefulness of recognition in curbing unconstitutionality has been defeat since an enquiry into the process by which a government originates is no longer tenable in international law. For this reason, recognition of government was argued as better abolished. However, the abolition of recognition of governments is not the solution.

2.4. Abolition of Recognition of Governments: Not a Solution

States are not generally concerned with the internal process that confers a government as the representative of a state if a change of government takes places per constitutional procedures.⁹⁸ The needs to recognise a government arises only in circumstances where there is a forcible overthrow of an existing government, accession to power of a new government by a procedure not provided for by the constitution of a state, the continuance in power of an existing government in violation of constitutional procedures.⁹⁹ When these circumstances occur in a state, recognition is necessary for the following reasons:

⁹⁷ Pamela P. Price "The Impact of Constitutive Recognition on the Right to Self-Determination: An Analysis of United States Recognition Practices Utilizing the Chinese Question as a Guide" (1979) 14 Val. UL Rev at 123.

⁹⁸ See also, Michael E Field "Liberia v. Bickford: The Continuing Problem of Recognition of Governments and Civil Litigation in the United States" (1994) 18 Md. J. Int'l L. & Trade at 113. Note, the decision or question of recognition does not arise when a government origin is constitutional.

⁹⁹ Prakash K Menon "Some Thoughts about the Law of Recognition" (1991) 3 Sri Lanka J. Int'l L. at 94.

2.4.1. Confirmation of a Regime Status

Recognition confirms the status of a state and its lawful representatives in the comity of states.¹⁰⁰ It is only through recognition that a government can exercise its rights as the legitimate ruler of a state. This does not mean that a government cannot be in existence or the government acting as the representative of the state does not exist in international law before recognition.¹⁰¹ Instead, recognition confirms the existence of the government as the legitimate representative of the state and its citizens.

In practice, the non-recognition of a government means that its legitimacy to act on behalf of the state is in doubt.¹⁰² In effect, rights and benefits that are derived as a result of recognition may be affected or not acknowledged.¹⁰³ For instance, non-recognition would result in the loss of financial or technical assistance such as development aid, military exchange/training and monetary support which a recognised government could ordinarily obtain. Military assistance to the recognised interim government of Afghanistan after the fall of the Taliban and Operation Enduring Freedom (OEF) in 2001 is a typical example.

The United Nations Security Council used Article 42 of the United Nations Charter to ensure that the recognised interim government of Afghanistan received the necessary assistance to eradicate terrorism.¹⁰⁴ Sikander Ahmed Shah notes that, in terms of the Bonn agreements, a six-month International Security Assistance Force (ISAF) was established in Afghanistan for the sole purpose of maintaining security, promoting peace and nation-building to facilitate the reconstruction of the country.¹⁰⁵ If the interim government of Afghanistan were not recognised, ISAF assistance and the benefits accorded to the government would not have taken place.

¹⁰⁰ Philip Marshall Brown "The Legal Effects of Recognition" (1950) *American Journal of International Law* at 638.

¹⁰¹ Stefan Talmon "Recognition of Governments: An Analysis of the New British Policy and Practice" (1993) 63 *British Yearbook of International Law* at 279.

¹⁰² Edwin D Dickinson "Recent Recognition Cases" (1925) 19 *The American Journal of International Law* at 263.

¹⁰³ Eugene F Kobey "International Law- Recognition and Non-Recognition of a Foreign Government" (1950) 34 *Marq. L. Rev.* at 282.

¹⁰⁴ Relying on Resolution 1386 (2001), the United Nations Security Council called upon states to assist the recognised interim government with personnel, equipment and resources to fulfil its mandate of eradicating terrorism in the state. See UN. Doc. S/RES/1386 (Dec. 20, 2001), also, Grant T Harris "The Era of Multilateral Occupation" (2006) 24 *Berkeley Journal of International Law* at 49-51.

¹⁰⁵ Sikander Ahmed Shah "War on Terrorism: Self defense, Operation Enduring Freedom, and The Legality of US drone attacks in Pakistan" (2010) 9 *Wash. U. Global Stud. L. Rev.* at 113.

Therefore, the recognition of governments is essential to international law and states as it confirms the legitimacy of a government to act on behalf of a state and, in turn, ensures that such governments receive certain rights and benefits.

2.4.2. Conferment of Legal Personality

Recognition of government as a general concept of international law introduces and acknowledges the existence of a government based on certain factors such as the lawfulness of its origin or character. Once a regime has established itself as the lawful representative of the state beyond any re-establishment, states are bound to acknowledge the regime. The acknowledgement in fulfilment confers a legal personality on a regime as the sole representative of the State.¹⁰⁶ Its denial or non-acknowledgement automatically deprives its status.¹⁰⁷ As such, the mere fact that a state is recognised does not grant an unrecognised government authority to act on behalf of the state.¹⁰⁸

As early as the nineteenth century, the United Kingdom and United States Courts failed to acknowledge the existence of an unrecognised government as legally existing.¹⁰⁹ It was a matter of practice for these courts to be bound by the decision of the executive branch of their governments, especially on matters relating to recognition.¹¹⁰ As such, the courts do not in practice grant *locus standi* to governments that are not recognised, because an enquiry into claims by such government may result in overlapping of constitutional powers between the executive and the judiciary. Likewise, the acknowledgement of an unrecognised government by the judiciary would easily be misconstrued as the recognition of the governments.¹¹¹ In *Stone Engineering Co v Petroleos Mexicanos*, the United States Supreme Court affirmed its position on *locus standi* by stating that: ¹¹²

¹⁰⁶ Hersch Lauterpacht "Recognition of Governments: II. III. The Legal Nature of Recognition and the Procedure of Recognition" (1946) Columbia Law Review at 37- 38.

¹⁰⁷ Hersch Lauterpacht "Recognition of Governments: II. III. The Legal Nature of Recognition and the Procedure of Recognition" (1946) Columbia Law Review 38.

¹⁰⁸ Jonathan Hill & Adeline Chong *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Bloomsbury Publishing, 2014) at 23.

¹⁰⁹ Martha Peterson "Recognition of Governments Should Not Be Abolished" (1983) 77 The American Journal of International Law at 31.

¹¹⁰ In re Cooper (1900) 143 U. S. 677, Percy v. Stranahan (1907) 205 U. S. 257.

¹¹¹ Louis Leventhal Jaffe *Judicial Aspects of Foreign Relations: In Particular of the Recognition of Foreign Powers* (Harvard University, 1933) at 129-30.

¹¹² *Stone Engineering co v Petroleos Mexicanos* (1945) 352 Pa. 12, 16, 42 A. 2d 57, 59

When the Department of State makes known its determination with respect to political matters growing out of or incidental to our Government's relations with a friendly foreign state, it is the duty of the courts to abide by the status so indicated or created and to refrain from making independent inquiries into the merit of the State Department's determination or from taking any steps that prove embarrassing to the Government in handling of its foreign relations.

According to Lauterpacht, "no judicial existences can be attributed to an unrecognised government and no legal consequences of its purported factual existence can be admitted. The correct and reasonable rule is that both the unrecognised government and its acts are a nullity."¹¹³ English Courts' decisions in this regard have been uniform to the point of rigidity. The Courts have declined to grant relief concerning contracts made with unrecognised governments as well as governments of unrecognised states. Furthermore, the English Courts have refused unrecognised governments the right to sue or claim jurisdictional immunity and have not acknowledged the validity of acts of organs of such governments. However, this does not mean that cases involving unrecognised governments never have or cannot be adjudicated by the English Courts.¹¹⁴

Subject to some exceptions such as when justice or public policies are necessary, the decision of the English Courts has always been firm.¹¹⁵ In the *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA*¹¹⁶, a cargo of rice was purchased by the Republic of Somalia to be shipped to its capital Mogadishu. Due to insurgent activities following the overthrow of President Siad Barre, and the problem of identifying the legal entity which should be regarded as the government of Somalia to claim the goods, the captain of the ship refused to enter Mogadishu.¹¹⁷ The cargoes were sold and the proceeds paid to a court in London.

¹¹³ Lauterpacht "Recognition of Governments: II. III. The Legal Nature of Recognition and the Procedure of Recognition" at 37-42.

¹¹⁴ Martha Peterson *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* (Macmillan, New York, Houndmills, Basingstoke, Hampshire, 1997) at 37.

¹¹⁵ The position in English law is set out in Halsbury's Laws of England, 4th ed., Vol. 18 (1977), p. 735, para. 1431: "A foreign government which has not been recognised by the United Kingdom Government as either de jure or de facto government has no locus standi in the English courts. Thus, it cannot institute an action in the courts . . . The English courts will not give effect to the acts of an unrecognised government."

¹¹⁶ *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* Queens Bench Division [1992] Queens Bench Division 609 to 623.

¹¹⁷ Benedict Kingsbury "Judicial Determination of Foreign "Government" Status" (1993) 109 Law Quarterly Review at 377.

Through its solicitors, the interim government of Somalia headed by Ali Mahdi Muammar issued a summons to lay claim to the proceeds. On the question of whether the interim government was the proper representative of Somalia for the claim, Hobhouse J stated that presently, there is no functioning government in Somalia, and the political future of the country remains uncertain.¹¹⁸ The Court quoted the requirements for a recognised government and held that the interim government did not satisfy the approach as the Republic of Somalia had no acknowledged government. The Court decision concurs with the decision of the United States' Supreme Court that judicially, an unrecognised government, is regarded as no government.¹¹⁹ Therefore, it is clear that whatever academics say, recognition of government is of importance in judicial matters for the government seeking judicial solutions.

2.4.3. Promotes Political Stability

Recognition promotes political stability in a state by eradicating the uncertainty surrounding the authority of a state in situations where a complicated, sudden, or unconstitutional change of government occurs.¹²⁰ It indirectly warns illegitimate actors intending to capitalise on the unexpected change in governance that such acts will not be accepted, nor will there be any form of a political or legal relationship between them and the international community.

Another importance of recognition concerning political instability is reflected in circumstances where two autonomous powers are in effective control of significant parts of a state and assert a level of sovereign political permanence. An example here is the case of Ivory Coast, otherwise known as Cote d'Ivoire.¹²¹ In 2010, a democratic

¹¹⁸ Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA (Queens Bench Division) (1992)

¹¹⁹ Max Milstein "De Facto Governments--The Significance of Their Acts in Our Courts" (2014) 8 St. John's Law Review at 158 to 165.

¹²⁰ Prakash Menon "Some Thoughts About the Law Of Recognition" (1991) 3 Sri Lanka J. Int'l L at 102. Menon explains that the recognition of governments arises only "when there is a forcible overthrow of an existing government, accession to power of a new government by a procedure not provided for by the constitution of a state or the continuance in power of an existing government in violation of constitutional procedures. See also, Jean D'Aspremont "The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks" (2011) 22 European Journal of International Law at 877. Another circumstance explained by Aspermont is when "when two warring government seeks the accreditation within the international organisation or when a state invites other states to carry out military operation in its territory."

¹²¹ A state in West Africa with a record population of 22, 400,835.

election was conducted between two presidential candidates, Mr Laurent Gbagbo of the Presidential Majority Party (La Majorities presidentially-LMP) and Mr Alassane Ouattara representing the Rally of Houphouetists for Democracy and Peace Party.¹²² As a result of inconsistency in the declaration of the electoral results, Cote d'Ivoire found itself in a situation of two governments contesting for recognition.¹²³

After deliberations, the Economic Community of West Africa State (ECOWAS) and the Peace and Security Council of the African Union (AU) responded to the inconsistency by endorsing and recognising Ouattara as the recognised legitimate President of Cote d'Ivoire. The recognition of Ouattara was met with mixed reactions that later escalated into armed violence in several locations across the country with significant loss of life, property and human rights violations caused by some loyalists who proclaimed Gbagbo as the winner of the election.¹²⁴

In response to the crisis, the United Nations Security Council adopted a passive approach by affirming that it supported the views of ECOWAS and the AU.¹²⁵

In contrast, the United States of America and France openly declared Ouattara as the winner of the election and the lawful democratic president of Cote d'Ivoire. Gbagbo reacted to the declarations by taking an oath of office as the legitimate president of Cote d'Ivoire and has been in control of the state administration, supported by strong regional majorities and winning the election with 46 per cent votes. In defence of his action and international responses to the state crisis, Gbagbo stated:¹²⁶

In recent days, I have noted severe cases of interference. I am charged with defending our sovereignty, and I will not negotiate on that. I have never called on someone from outside to put me in office.

See Lydia Poole, 'Political and Humanitarian Crisis in Cote d'Ivoire, 2010-2011

<<http://www.globalhumanitarianassistance.org/political-and-humanitarian-crisis-in-cote-d'ivoire-2010-2011-2447.html>>,

¹²² Cote d'Ivoire (2010-2011): Situation of Human Rights Defender 13 May. 2015

<<http://www.fidh.org/en/africa/Cote-d-Ivoire.566/COTE-D-IVOIRE-2010-2011>>

¹²³ Yejoon Rim "Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Cote d'Ivoire" (2012) 25 Leiden Journal of International Law at 683

¹²⁴ Scott Straus "'It's Sheer Horror Here': Patterns of Violence during the First Four Months of Côte d'Ivoire's Post-Electoral Crisis" (2011) 110 African Affairs at 481-89.

¹²⁵ Yejoon Rim "Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Cote d'Ivoire" (2012) 25 Leiden Journal of International Law at 686.

¹²⁶ Ivory Coast Crisis as Presidential Rivals both Sworn In' *BBC News* 03 Mar. 2016

<<http://www.bbc.co.uk/news/world-africa-11919256>>

Within hours of Gbagbo's swearing an oath of office, Ouattara responded by also swearing an oath of office because he was the declared winner of the election by Cote d'Ivoire Independent Electoral Commission. Ouattara claims are authoritative since the election reports affirming him as the recognised winner of the election were acclaimed as lawful, free and fair by accredited observers, regional and international organisations. However, its nullity and cancellation by Cote d'Ivoire Constitutional Council after allegations of ballot fraud by Gbagbo's supporters in some regions made his claim of legitimacy void. The political instability in Cote d'Ivoire was curbed through recognition of Ouattara as the democratically elected representative of Cote d'Ivoire. These reduced the margins of the death toll of casualties and boosted the economy of the depreciated state.

2.4.4. Deters Unconstitutionality

Recognition of government has the potential to reduce unconstitutional and illegitimate overthrow of governments. The non-recognition of the coup d'etat led regime that deposed the democratically elected president of Sierra Leone, President Ahmed Tejano Kabbah, and the endorsement of military action by the OAS for the restoration of the candidacy of the democratically deposed president of Haiti demonstrate this evidence.

Regimes intending to rule unconstitutionally have collapsed under the weight of non-recognition and sanctions. Between 2003 and 2013, the African Union suspended eight states from its membership as a result of the coups that took place in the states.¹²⁷ Likewise, a total of thirteen sanctions are currently invoked by the United Nations Security Council on some regimes that have refused to uphold the principle of human rights, democracy and self-determination.¹²⁸ Although the word 'democratisation' is often not found per se in some of the resolutions, elements of democratisation are always in the agenda of some of the sanctions.¹²⁹ The support of

¹²⁷ The following states were suspended: Central African Republic (CAR), Côte d'Ivoire, Guinea, Guinea-Bissau, Madagascar, Mali, Mauritania and Niger. See Sturman Kathryn "The Use of Sanctions by the African Union: Peaceful Means to Peaceful Ends?" (2009) South Africa Yearbook of International Affairs at 97- 98 and Alex Vines "A Decade of African Peace and Security Architecture" (2013) 89 International Affairs at 91.

¹²⁸ UN Sanctions *Security Council Report: Special Research Report* 29 Mar. 2013 <<http://www.securitycouncilreport.org/special-research-report/un-sanctions.php>>.

¹²⁹ Most of the resolutions are worded in such a way that democratic factors cannot be ignored e.g. Resolution 1518 sanction of Iraq and Resolution 2048 of Guinea Bissau.

Cambodia democratic government against its opposition,¹³⁰ the re-instalment of Sierra Leone elected government removed by unconstitutional mean¹³¹ and the adoption of the Santiago commitment Organisation of America States asserts these claims.

Furthermore, unconstitutional, and illegitimate usurpation are no longer supported by states. For example, the military coup in Guinea-Bissau in 2012 brought about resolution 2048, for the restoration of constitutional order. As for Iraq, the primary objective of resolution 1518 in 2003 was the quick facilitation of democratic transition.¹³²

2.4.5. Protection of a State's Sovereignty

The need to protect the sovereignty of a state from internal or external attacks may arise at any time such that the need for outside help may be required. Recognition of governments provides the rightful holder of authority in a state the avenue to seek help to protect its sovereignty through intervention by invitation. Erika De Wet affirms "the only authority within a state entitled to extend an invitation for military assistance to another state, whether in the form of troops or arms, is the internationally recognised de jure government of a state."¹³³ The recognition of governments is a requirement of international law for this reason alone. Therefore, one way to answer why the recognition of governments is essential to international law is to say that recognition of governments protects sovereignty by providing the rightful holder of authority in a state the avenue to seek help to protect its sovereignty through intervention by invitation.¹³⁴ For example, in 2012, the

¹³⁰ See UNSC Res. 864 (1993) (Angola), UNSC Res. 880 (1993) (Cambodia), UNSC Res. 1216 (1998) and UNSC Res. 1580 (2004) (Guinea-Bissau).

¹³¹ See UNSC Res. 1156 (1998) and UNSC Res. 1181 (1998).

¹³² UNSC Res. 1518 (2003).

¹³³ Erika de Wet "The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force" (2015) 26 *European Journal of International Law* at 982. See further explanations by Kaiyan Homi Kaikobad "Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004" (2005) 54 *International and Comparative Law Quarterly* at 256-7. See also, Richard A Falk "Janus Tormented: The International Law of Internal War" (1964) 185 *International Aspects of Civil Strife* at 223, François Roch "Antonio Cassese, International Law, Oxford, Oxford University Press, 2005" (2004) 17 *Rev. quebecoise de droit int'l.* at 307.

¹³⁴ Louise Doswald-Beck "The legal validity of military intervention by invitation of the government" (1986) 56 *British Yearbook of International Law* at 189. According to Roberts Jennings and Arthur Watts, "an act of intervention by invitation will be lawful only, if the party extending the invitation

sovereignty and the territorial integrity of Mali came under armed attack. Its northern region was enmassed with various terrorist groups who had different aspirations for the state.¹³⁵ On 6 April 2012, the northern parts of Mali were over-powered and subject to attacks by the external forces, whom unilaterally declared the territory as “The Independent Republic of Azawad.”¹³⁶

While this was taking place, the Malian soldiers tasked with the duties of protecting the sovereignty, and territorial integrity of the state staged a mutiny that resulted in a *coup d'état*.¹³⁷ At the request of the head of Mali's internationally recognised government, President Dioncttounda Tratore, France launched airstrikes to deter offensive actions of the external forces, thereby protecting the sovereignty of Mali.¹³⁸ The intervention termed “Operation Serval” would not have been possible had the recognition of government not provided an avenue for the recognised government of Mali to call for intervention for the protection of its sovereignty and territorial integrity from external armed attacks.

2.5. Effects of Non-recognition on a Government

There are many adverse effects of non-recognition of governments, which are non-integration into the society, inability to request mutual assistance such as military aids in terms of terrorism, relief and welfare aids in the aftermaths of civil war or natural disasters. The following section discusses these:

2.5.1. Non-Integration into International Society

As noted earlier, the relationship between international law and recognition of governments dates to the Middle Ages when the admission of polities to the Papal States relied heavily on the recognition of the rulers of such policies.¹³⁹ In modern

effectively controls the territory of the state and is a legitimate representative of the people within the inviting state.” See also Robert Jennings and Arthur Watts Oppenheim's International Law. Volume 1, Peace at 150, 435-438 see also, Louise Doswald-Beck “The Legal Validity of Military Intervention by Invitation of the Government” 1986 56(1) British Yearbook of International Law at 189.

¹³⁵ The terrorist group consisted of Al Qaeda in the Islamic Maghreb is al Qaeda's North African wing, made up mostly of foreign fighters. the Movement for Oneness and Jihad in West Africa, Tuareg group, and the National Movement for the Liberation of Azawad (MNL)

¹³⁶ Karine Bannelier & Theodore Christakis "Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict" (2013) 26 Leiden Journal of International Law at 856.

¹³⁷ At 856.

¹³⁸ Karine Bannelier & Theodore Christakis "Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict" at 856-60.

¹³⁹ Grewe Wilhelm G *The Epochs of International Law* (Walter de Gruyter, 2000) at 13.

times, international acceptance of a state and its government largely depends on its recognition by other states; this gives a state and its representative the authority to participate in international conferences, multilateral conventions, bilateral relations and international transactions.¹⁴⁰ Conversely, non-recognition limits such participation. For example, an unrecognised government cannot participate in activities with international organisations.¹⁴¹ It also lacks the authority to assert rights and immunities that a recognised government would usually enjoy.¹⁴² For instance, states enjoy the rights and obligations enshrined in the United Nations Charter through representation in at least one of the United Nations' organisations.¹⁴³ The implementation of such rights and obligations would be difficult for a government that is not recognised.

In 1974, United Nations Secretary-General Kurt Waldheim disagreed with the President of the General Assembly's decision to grant the head of the Palestine Liberation Organisation, Yasser Arafat (who had requested to address the General Assembly) the right to sit on a unique chair that is customarily occupied by Heads of States.¹⁴⁴ Realising that he was an unrecognised head of an unrecognised state, Arafat agreed to Mr Waldheim's demand by standing in a reclining posture beside the chair instead of being seated.¹⁴⁵ Waldheim's request demonstrates the attitude of the international community towards an unrecognised government.

In effect, the abilities of such governments to participate in multilateral conventions and bilateral relations are limited.¹⁴⁶ For example, an unrecognised

¹⁴⁰ Kelsen Hans *The General Theory of Law and State* (Harvard University Press, Cambridge, 1949) at 283.

¹⁴¹ This is so because only recognised governments are integrated into the comity of states. The OECD was established as a government forum in 1961 and its current membership stands at 34 including states across North and South America, Europe, Asia and the Pacific. The organisation has significantly assisted economic and social development in developed and underdeveloped member states. See <<http://www.oecd.org/>>.

¹⁴² Myres S McDougal & Richard M Goodman "Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution" (1966) 60 *The American Journal of International Law* at 667.

¹⁴³ Myres S McDougal & Richard M Goodman "Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution" (1966) 60 *The American Journal of International Law* at 667.

¹⁴⁴ Costas M Constantinou & Yiannis Papadakis "The Cypriot State (s) in Situ: Cross-ethnic Contact and the Discourse of Recognition" (2001) 15 *Global Society* at 125-148.

¹⁴⁵ Costas M Constantinou & Yiannis Papadakis "The Cypriot State (s) in Situ: Cross-ethnic Contact and the Discourse of Recognition" (2001) 15 *Global Society* at 125-148.

¹⁴⁶ Hans Kelsen *The General Theory of Law and State* (Harvard University Press, Cambridge, 1949) at 283.

government cannot be a participant in the Organisation for Economic Co-operation and Development Forum (OECD).¹⁴⁷ Likewise, an unrecognised government cannot be a part of international institutions such as the African Union, Organisation of the American States or the United Nations. These may result in hardship for a state since its ability to participate in germane meetings that might aid its socio-economic development would be hindered by the non-recognition of its government.¹⁴⁸

However, the level of inter-relations is often minimal. For example, in 2007, the president of Fiji, Frank Bainimarama came into power unconstitutionally after a successful coup that overthrew the democratically elected prime minister, Laisenia Qarase. The unconstitutional regime was suspended from the Commonwealth and Pacific Islands Forum.¹⁴⁹ Major states like Australia and New Zealand disassociated themselves from such regimes. Not until 2014 when the regime became legalised itself through democratic election did it become recognised.

2.5.2. Inabilities to Request Mutual Assistance

The non- recognition of a government has economic impacts and risks which would result in loss of financial or technical assistance such as development aid, military exchanges/training and monetary assistance which a recognised government would ordinarily have obtained. For example, in 2001, The Security Council enforcing its mandate under Article 42 of the United Nations Charter had ensured the recognised interim government of Afghanistan received the necessary assistance needed in its state eradication of terrorism.¹⁵⁰

If the interim government had not been recognised such assistance would not have been accord; Benefits such as help in the re-establishment of state health finance; growth innovation and strategies; market developments and forum gatherings that ensure the interim government shares experiences would have been miss by Afghanistan. For this reason, the non-recognition of a government signifies

¹⁴⁷ The OECD was established as a government forum in 1961, as of today 34 states spanning across north and south America, Europe, Asia and Pacific are its members see 5 Aug 2013
<<http://www.oecd.org/>>

¹⁴⁸ Sean D Murphy "Democratic Legitimacy and the Recognition of States and Governments" (1999) 48(03) International and Comparative Law Quarterly at 157

¹⁴⁹ Stewart Firth "The Fiji Election of 2014: Rights, Representation and Legitimacy in Fiji Politics" (2015) 104 The Round Table at 112.

¹⁵⁰ UN SC S/Res/1386 (2001)

its non-acceptance by states as representative of the state it claims to represent, which can have substantial material impacts upon the state.

2.6. Conclusion

This Chapter explored the recognition of governments in international law and considered some factors that render it essential. The Chapter answer parts of the research question as to why the recognition of governments is important to international law.

In effect, the Chapter contends that the recognition of governments has legal and material impacts upon states. Talk of removing it seems to ignore that it has a real impact, which is something of an inconvenient truth to those that wish to abolish the concept. The only issue seems to be whether we leave it entirely in the political realm (which seems unlikely considering the legal impact of non-recognition on a government) or recognise it as an international legal norm. Given its impacts upon the lives of citizens, the latter course seems both practically and morally justified.

Chapter Three: The Recognition of Government Problem

3.1. Introduction

In Chapter Two, some of the issues that resulted in the current recognition of governments debates were discussed. This Chapter now provides an in-depth analysis as to why the recognition of governments is controversial via three main sections. The first section discusses the difficulties that arises as a result of the inability to analytically distinguish between the recognition of governments and states. The second section discusses the problems that arise as a result of the inability to distinguish between the political and legal basis of recognition. The third section discusses the confusion and problems that arise as a result of the use of inappropriate terminology and ambiguous terms during the recognition of a government. At the end of this Chapter, the author concludes that the absence of an objective approach is the primary cause of the recognition of government controversies.

3.2. Distinguishing Between Recognition of States and Recognition of Governments

The inability to analytically distinguish between the recognition of state and government as subjects of international law have attracted critiques as to what approach truly circumscribe the practice of recognition in international law.¹⁵¹ While some academics of recognition are united in the treatment of recognition as a matter best situated to states as opposed to governments.¹⁵² Others, believe that recognition as a general topic of international law relates to states and governments combine based on the fact that a government cannot exist without a state and vice-versa.¹⁵³ The failure of academics to reach an agreement on this matter has contributed to the confusion surrounding the recognition of governments in

¹⁵¹ See also, Robert D Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory Int'l L. Rev. at 113.

¹⁵² Martha Peterson "Recognition of Governments Should Not Be Abolished" (1983) 77 The American Journal of International Law at 33. See also, Thomas Grant *The Recognition of States: Law and practice in Debate and Evolution* (Greenwood Publishing Group, 1999), Sean Murphy "Democratic legitimacy and the Recognition of States and Governments" (1999) 48 International & Comparative Law Quarterly at 545 to 581, Hans Kelsen "Recognition in International Law" (1941) 35 American Journal of International Law at 605-617, Herbert Briggs "Recognition of states: some reflections on doctrine and practice" (1949) 43 American Journal of International Law at 113. See also, Gerhard Erasmus "Approach for Determining Statehood: John Dugard "Recognition and the United Nations" (1988) 4 South African Journal on Human Rights at 207 to 220.

¹⁵³ Robert D Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory Int'l L. Rev. at 113.

international law.¹⁵⁴ For instance, Ian Brownlie contends that it is impossible not to conflate the recognition of government and state as one, because in principle, most of the approach set out for the recognition of state apply equally to the recognition of government. According to him, "the existence of an effective government is the essence of statehood, and, significantly, recognition of states may take the form of recognition of a government."¹⁵⁵ Similarly, James Crawford notes that "for a state to exist as an entity, it must possess a government or a system of government that is in general control of its territory, to the exclusion of other entities."¹⁵⁶

It is difficult not to agree with these academics considering firstly, that a government existence is part of statehood¹⁵⁷ and the existence of a state depends on the presence of an effective government.¹⁵⁸ Secondly, the general requirement for the recognition of governments in international law relies on similar approach as the recognition of states. Indeed, a government will not be recognised as the lawful representative of a state if it fails among other requirements to effectively control substantial parts of a state population and its territories.¹⁵⁹ Hence, the recognition of state and the recognition of government should be treated as the same topic with the same approach considering the maxim that "there is no government without a state, there is no state without a government".¹⁶⁰ The importance of this is noted in the advisory opinion of the International Committee of Jurists in the *Aaland Island Case* when it declared that Finland was not a sovereign state from 1917 to 1918 due

¹⁵⁴ Robert Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) *Emory Int'l L. Rev.* at 112-113.

¹⁵⁵ Ian Brownlie *Principles of public international law* (Oxford University Press, 1990) at 689.

¹⁵⁶ James R Crawford *The Creation of States in International Law* (OUP Oxford, 2007) at 45-46. Robert Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 *Emory Int'l L. Rev.* at 107.

¹⁵⁷ The Arbitration Commission of the European Conference on Yugoslavia affirms that a "state is commonly defined as a community which consists of a territory and a population, subject to an organised political authority." Craven Matthew CR "The European Community Arbitration Commission on Yugoslavia" (1996) 66 *The British Year Book of International Law* at 333.

¹⁵⁸ Article 1 of the Montevideo Convention on Rights and Duties of States is clear that a state as a person of international law must, among other things, possess a government. See, Convention on Rights and Duties of a State adopted by the Seventh International Conference of American States, 26 December 1933, 165 LNTS 19.

¹⁵⁹ This is discussed in more details in Chapter four.

¹⁶⁰ Brad R Roth *Governmental illegitimacy in international law* (Oxford University Press on Demand, 2000).

to its lack of a government.¹⁶¹ However, Brad Roth contends that the maxim that a state cannot be separated from a government because both are interwoven is false.¹⁶² Roth maintains that statehood is a normative rather than an empirical fact because a state does not necessarily cease if its government descends into chaos, nor is it reduced in size.¹⁶³ It implies that the personality of a state is not affected by changes in governance. A state remains a state no matter the changes and transformation it undergoes, and its normative character remains constant while that of a government may cease.

Hence, the notion that a state cannot exist without a government, or a government cannot exist without a state is invalid as there have been instances in international law where states have existed without functioning governments. For the past 21 years, Somalia has been ripped apart with insurgency, Islamic extremists, pirate gangs and Clan militias, yet it continued to exist as a state without government.¹⁶⁴ Also, despite the non-recognition of Tibet as a state, the government of Tibet continues to exist in exile. Based on these examples, a state can indeed exist without a government and a government can exist without a state. As such, the recognition of a government should be treated as entirely separate from the recognition of a state. As far as statehood is concerned, the factual situation should be examined case by case because different approach applies when a change in government occurs, and recognition will only really be relevant where the change in

¹⁶¹ Reports of the International Committee of Jurists Entrusted by Council of the League of Nations with the Task of giving an Advisory Opinion upon the Legal Aspects of Aaland Islands Question, LNOJ spec Supp. 3(1920) (hereinafter the Aaland Island Case (1920) at 8-9. The Committee stated that for a considerable time, the conditions required for the formation of a sovereign state did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a state, even some elements of fact, were lacking for a relatively considerable period... It is, therefore, difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign state. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.

¹⁶² Brad Roth *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 2000) at 130.

¹⁶³ Brad Roth *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 2000) at 130.

¹⁶⁴ Harish Venugopalan, "Somalia: A failed state?" < <https://www.orfonline.org/research/somalia-a-failed-state/>> accessed on 28 August 2019.

government is unconstitutional.¹⁶⁵ As noted in *Russian Government v Leigh Valley* by the US Court of Appeal:¹⁶⁶

The granting or refusal of recognition of governments has nothing to do with the recognition of states itself. If a foreign state refuses the recognition of a change in the form of government of an old state, the latter does not thereby lose its recognition as an international person. The suit did not abate by the change in the form of government in Russia; the state is perpetual and survives the form of its government.

In the above case, the Ambassador of the Russian provisional government commenced a legal suit in the name of the 'State of Russia' despite the dissolution of the country's interim government. The Court's decision rests on the fact that a state may survive without an effective government. As noted earlier, the recognition of Somalia as a state in the Horn of Africa is not in doubt. Neither is the lack of a functioning government even though different attempts to form one in the past 21 years have had an effect on the recognition of the state as Somalia.¹⁶⁷ While Somalia would miss out on some of the benefits discussed in Chapter two of this study that would ordinarily be accrued by a recognised government. Somalis' right as citizens of Somalia (for example citizenship) will not be denied because of its lack of a recognised government.¹⁶⁸

States under the control of terrorists or embroiled in secessionist conflict will continue to exist as states. This is so because once a state is recognised as having acquired statehood, it is hard for it to lose its status, even if it no longer meets some of the approach for statehood. However, the case of a government is an entirely different situation because a government can lose its status by the withdrawal of its recognition.¹⁶⁹ In 2012, the United States, the United Kingdom, the Arab League and the Gulf Cooperation Council tactically withdrawn their recognition of Syrian President Bashar Assad by recognising the opposition, National Coalition of Syrian

¹⁶⁵ Shaw Malcolm *International Law* (Cambridge University Press, Cambridge, 2003) at 377.

¹⁶⁶ *Russian Government v Leigh Valley R.R* [1919], 293 Fed.133, [1924] 265, 573.

¹⁶⁷ Pijovic Nikola "To be or Not to be: Rethinking the Possible Repercussions of Somaliland's International Statehood Recognition" (2014) 14 African Studies Quarterly at 18.

¹⁶⁸ Pijovic Nikola "To be or Not to be: Rethinking the Possible Repercussions of Somaliland's International Statehood Recognition" (2014) 14 African Studies Quarterly at 18.

¹⁶⁹ McCorquodale Robert "The Creation and Recognition of States" (2005) 2 Public International Law: an Australian Perspective at 192.

Revolutionary and Opposition Forces (NCSROR) as the legitimate representative of the Syrian People.¹⁷⁰

While the concept of a state is linked to the presence of a ruling apparatus, the absence of government does not necessarily limit its statehood.¹⁷¹ Once a state has been recognised, its legal personality continues notwithstanding internal divisions that may affect its governance and administration.¹⁷² Withholding recognition of a state on the basis that it lacks an effective government automatically violates its autonomy as a sovereign state. As explained by Ti Chiang Chen:¹⁷³

In recognition of governments, there is no question of the creation of personality. For the personality belongs to the state and survives the change of government...the continued existence of the state renders it the more compelling that the recognition of government should not be duly delayed. The government is the sole organ through which a state expresses its will. The refusal to recognise and to deal with it would deprive the state of the means of exercising its international rights, particularly those requiring positive actions.

Failure to reach consensus on the separation of these two concepts, i.e. the recognition of states and the recognition of government, has made the recognition of government controversial.¹⁷⁴ On the one hand, Chen asserts that the recognition of the government and the state are different concepts as the legal personality and continuity of a state is not affected or interrupted by changes in government. However, Thomas Baty disagrees by affirming that the continuity of a state survives in temporary situations only. When conflict escalates to an unreasonable extent, recognition becomes impossible. The problem, therefore, lies in determining what

¹⁷⁰ Richard Spencer "Britain Officially Recognise New Syrian Rebel Coalition as Countries 'Legitimate Government' *The Telegraph* <<http://www.telegraph.co.uk/news/9691319/Britain-officially-recognises-new-Syrian-rebel-coalition-as-countrys-legitimate-government.html>>, The GCC comprises Saudi Arabia, Bahrain, the United Arab Emirates, Oman, Qatar and Kuwait see recognition *decision on Gulf Cooperation Council Recognises Syrian Opposition Bloc*, 13 Nov. 2012 <<http://en.rian.ru>>, Ian Black "UK: Syrian opposition 'sole legitimate representative' of the people" *The Guardian* 8 Aug. 2013 <<http://www.theguardian.com/world/2012/nov/20/uk-syrian-opposition-sole-legitimate-representative-people>>.

¹⁷¹ Brad Roth, *Reconceptualising Recognition of States and Governments* in Yuri Van Hoef "Recognition in International Relations: Rethinking a Political Concept in a Global Context" edited by Christopher Daase, Caroline Fehl, Anna Geis and Georgios Kolliarakis" (2015) 91 *International Affairs* 130.

¹⁷² Ti-Chiang Chen *The International Law of Recognition: with Special Reference to Practice in Great Britain and the United States* (Praeger, 1951) at 103-104.

¹⁷³ Ti-Chiang Chen *The International Law of Recognition: with Special Reference to Practice in Great Britain and the United States* (Praeger, 1951) at 103-104.

¹⁷⁴ Robert Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 *Emory Int'l L. Rev.* at 107-112.

constitute a prolonged situation, what approach and when should recognition be accord?¹⁷⁵

Be that as it may, the author is of the position that a distinction between the recognition of states and that of governments is crucial due to the effects of non-recognition on a government. For example, as discussed in Chapter Two of this study, an unrecognised government lacks the *locus standi* to enforce judicial actions, it will lose out on benefits such as military assistance and would lack the authority to assert rights and immunities that a recognised government would usually enjoy. While a state will continue to exist, enjoy the benefits of its existence with existing treaties remaining in force in respect of any change it undergoes under any circumstances.

A solution to the current problem will be to review and distinguish clearly the approach for recognising governments and that of state to avoid the problem of conflating both as the same.

3.3. Distinguishing Between Political And Legal Basis of Recognition

The continued insistence that the recognition of a government is a political rather than a judicial matter has been the subject of much debate among states and academics.¹⁷⁶ Generally, It is accepted that recognition requires states to act in the exercise of political discretion, and there are no equivocal rule that establish a legal duty to recognise under any circumstances.¹⁷⁷ The refusal of the courts to grant *locus standi* to unrecognised governments and their continued insistence that the recognition of a government is a political matter further added to the confusion on

¹⁷⁵ Thomas Baty "Can an Anarchy be a State" (1934) 28 Am J. Int'l L. at 445. Baty believes that foreign countries cannot be expected to recognise anarchy and cannot be obliged to refrain from interference in a region for which nobody is responsible.

¹⁷⁶ Hersch Lauterpacht *Recognition in International Law* (Cambridge University Press, 2012) at 38. See, Joshua Downer "Towards a Declaratory School of Government Recognition" (2013) 46 Vand. J. Transnat'l L. at 581. Stefan Talmon "The Constitutive versus the Declaratory Theory of Recognition: Tertium non datur?" (2005) 75 The British Year Book of International Law at 101, Yossi Shain "Governments-in-Exile and International Legitimation" (1991) Governments-in-Exile in Contemporary World Politics at 219. See, Hans Agné "The Politics of International Recognition: Symposium Introduction" (2013) 5 IT at 94. See also, Leva Vezbergaite "International Recognition and Its Implications for the Statehood" (2015) 3 International Relations at 786-793. See Philip Brown "The Legal Effects of Recognition" (1950) 44 American Journal of International Law at 617 to 640. See, Jure Vidmar "Explaining the Legal Effects of Recognition" (2012) 61 International & Comparative Law Quarterly at 361 to 387.

¹⁷⁷ Robert Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 at 122

whether the recognition of governments is a legal or indeed a political matter with legal consequence.¹⁷⁸

Considering that the recognition of governments, as well as its underlying policy, are addressed by the political departments of each state and not the Courts;¹⁷⁹ It seems that the recognition of government cannot be argued as a matter of law because there exists no legal obligation on the part of any government to accord recognition nor any legal right exists on the part of any government to receive recognition.¹⁸⁰ However, some academics challenged this position because recognition manifests the legal existence of a government to act on behalf of a state and willingness of other states to transact with the government based on the existence.¹⁸¹ Therefore, it is believed that recognition of governments is a political act with legal consequences because any contract signed or reached by a politically recognised government is valid by law while that of an unrecognised government is invalid.

Also, only the lawful representative of a state has the full power to act on behalf of the state. Prior to recognition, the recognition status of a government is undefined.¹⁸² But, when a government is recognised, its status is defined and lawful, thus empowering it to act on behalf of the state and retroactively be bound by rights, obligations and contracts made on behalf of the state by law.¹⁸³ This situation contrasts starkly for an unrecognised government; the legal consequences of non-recognition are reflected by the failure of courts to grant an unrecognised

¹⁷⁸ Guaranty Trust Co., 304 U.S. 126, 137-38 (1938); See also Pfizer v. Gov't of India, 434 U.S. 308, 319-20 (1978).

¹⁷⁹ Jose Maria Ruda, "Recognition of States and Government" in Mohammed Bedjaoui (ed) *International law: Achievements and prospects* (Martinus Nijhoff Publishers, 1991) at 449. Stefan Talmon *Recognition of Governments in International Law: with Particular Reference to Governments in Exile* (Clarendon Press, Oxford, New York, 1998).29 at vii. and the International Law Commission, Sixth Report on Unilateral Acts by States (2003), Documents A/CN.4/534, Paragraph 9, Hersch Lauterpacht *Recognition in International Law* (Univ. Press, Cambridge, 1947) at 817.

¹⁸⁰ Robert Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 *Emory Int'l L. Rev.* at 121. Stanley K Hornbeck "Recognition of Governments" (1950) 44 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) at 181.

¹⁸¹ Jean D' Aspremont "Legitimacy of Governments in the Age of Democracy" (2006) 38 *New York University Journal of International Law and Politics* at 877.

¹⁸² Article 2(c) and 7 of the 1969 Vienna Convention on the Law of Treaties. See also, UN Doc. A/CONF. 39/27 1969).

¹⁸³ Stefan Talmon "Recognition of Governments: An Analysis of the New British Policy and Practice" (1993) 63 *British Yearbook of International Law* at 244.

government to judicial proceedings. Also, its acts and that of its representatives would be regarded as void.¹⁸⁴ The government will not be able to sign treaties on behalf of the states or officially enter legal relationships in the state name; neither can its actions be retroactive.¹⁸⁵ For these reasons, to accept that the recognition of a government is a mere political matter at the discretion of a recognising state is to concede it as a mere political matter.

Another main distinctive point that acknowledges recognition of governments as a political matter with legal consequences is the non-entitlement of unrecognised government to immunity. The judicial position is clear that an unrecognised government cannot claim immunity nor carry out judicial acts. The United States of America's position is that accreditation of an entity in the diplomatic list is the necessary condition for the enjoyment of diplomatic immunity. If an entity is not recognised, there will be no accreditation in the diplomatic list and, therefore, no immunity.¹⁸⁶ Furthermore, as discussed in Chapter Two of this study, a state whose government is refused recognition or whose government recognition is withheld could be deprived of international legal personality, rights and duties which it would have ordinarily enjoyed under international law as a result of recognition.¹⁸⁷

In the author opinion, recognition of governments should be classified as an entirely political matter with legal consequences because firstly, recognition of governments is an invitation to intercourse. Secondly, decisions on recognition of governments usually rest within the executive branch of a state rather than the judiciary, however the judiciary will not grant *Locus standi* to an unrecognised government. Thirdly, no court of law will accept the failure to recognise a government as a breach of rights because no legal obligation or rights exist.¹⁸⁸ Also, the practice

¹⁸⁴ Scott Davidson "Recognition of Foreign Governments in New Zealand" (1991) 40 The International and Comparative Law Quarterly 162 to 169.

¹⁸⁵ Most courts, including the United Kingdom and the United States holds this position. For further details, please refer to *Guaranty Trust v. United States* [1938] 308 U. S. 126, 137.

¹⁸⁶ *Yrissari v. Clement*, (1826) 2 Bing. 432; *O'Neill v. Central Leather Co.* (1915) 87 N. J. L.552; *United States v. Palmer* (1818) 3 Wheat. 610 *Knox v. PLO*, 306 F. Supp. 2d 424, 430 S.D.N.Y. (2004) *Efrat Ungar et al. v. Palestine Liberation Org.* 420 F3d 274, 282-83 (1st Cir. 2005) at 57

¹⁸⁷ See Chapter two.

¹⁸⁸ Joshua Downer "Towards a Declaratory School of Government Recognition" (2013) 46 Vand. J. Transnat'l L. at 584. Although, recent practices concerning the recognition of governments practices challenge this position. Evidence demonstrates that with some state shifts to democratic legitimacy,

of leaving recognition of governments to the political discretion of individual states seems to be gradually diminishing. In several recent recognition of government cases as Côte d'Ivoire (2010), Guinea-Bissau (2012), Mali (2012), and Gambia(2017), the United Nations and Organisation of African states have called for collective non-recognition or recognition of repressive governments.¹⁸⁹ Based on this new trend, the notion that the recognition of governments is a political matter, based on the absolute political discretion of states is contentious. Therefore, there is a need to re-examine the recognition of government approaches in order to avoid the unnecessary confusion on whether recognition is a political, legal or moral principle better left to the discretion of states, citizens or international organisations?

3.4. Unclear Statements and Faulty Terminologies

A government could be consider as recognised if it has expressly, tacitly, impliedly or silently been granted recognition.¹⁹⁰ When recognition is express, it takes the form of a formal declaration through official writing,¹⁹¹ statements of notification or public announcement by a recognising government to another.¹⁹² Express recognition does not necessarily require the word “recognise” to be in its wording. Although, an express recognition that consists of the word “recognise as the government” has the merit of clarity and the removal of confusion or doubts that may arise when determining whether a government is recognised or not.

On the other hand, implied or silent recognition is deemed to have taken place when a government does not expressly declare its recognition but does an act that is silently consistent with recognition such as the signing of treaties with a government or entering relations inofficiously.¹⁹³ However, confusion often arises as to whether

recognition of governments is becoming a legal matter because international law protects a universal right to democracy which in turn begets legal obligations.

¹⁸⁹ Example is the recognition of President Quattara in Cote d'Ivoire 2011, President Hadi in Yemen 2015 and the 2016 recognition of Government of National Accord in Libya 2016

¹⁹⁰ Ti-Chiang Chen *The international law of recognition* (Рипол Классик, 1951) at 189.

¹⁹¹ The decision of the Australian Government to recognize the Royal Government of National Union of Cambodia was conveyed by a formal message of the Australian Minister for Foreign Affairs to the Foreign Minister of that Government on 17 April 1975.

¹⁹² For example, the White House press release of 1 January 1949 announcing the decision to extend full recognition to the Government of the Republic of Korea: *US Department of State Bulletin*, 20 (1949) at 59-60. The declarations, “expressly states the willingness of the state to transact with the other government based on its status as the lawful representative of the state.

¹⁹³ Martha Peterson *Recognition of Governments: Legal Doctrine and State Practice 1815-1995* (Springer, 1997) at 87.

a state through its actions or use of terminologies intends recognition to occur or whether its actions were for other purposes.

Eighteen months into the Syrian conflict, Stefan Talmon published an article that drew further attention to the problem of unclear recognition statements, the use of inappropriate terminology and the effects of this problem on a recognised government.¹⁹⁴ Talmon asserts that a day after the rebranding of the Syrian opposition forces as the National Coalition for Syrian Revolution and Opposition Forces (NCSROF),¹⁹⁵ states began recognising the NCSROF as the legitimate representative of Syria, despite President Bashar al-Assad, the sitting president, retaining control of significant parts of the country. This commenced with a declaration from the Gulf Cooperation Council (GCC) of the National Coalition for the Forces of the Syrian Revolution and Opposition as the legitimate representative of the brotherly Syrian people.¹⁹⁶ Some few hours later, the Arab League of States stated support for the NCSROF and encouraged other Syrian opposition groups to join it.¹⁹⁷

Mindful of its terminology, the Arab League Council urged member states and other organisations to recognise the NCSROF as the “legitimate representative and primary negotiator with the Arab League.”¹⁹⁸ A few days later, France announced its recognition of “the Syrian National Coalition as the sole legitimate representative of the Syrian people and thus as the future provisional government of a democratic Syria which paves the way to put an end to Bashar Assad’s regime.”¹⁹⁹ In the following weeks, more states issued recognition statements including the European Union which announced that the *EU considers the National Coalition for Syrian*

¹⁹⁴ Talmon shed light on the effects of this problem on a recognised government and citizens of a state. The article, titled “Recognition of Opposition Groups as the Legitimate Representative of a People” received a download rank of 27194 on the Social Science Research Network (SSRN) and had 51 860 results on Google in its second week of publication. See, Stefan Talmon “Recognition of Opposition Groups as the Legitimate Representative of a People” (2013) Chinese Journal of International Law at 253.

¹⁹⁵ Otherwise known as the Syrian Opposition Coalition (SOC).

¹⁹⁶ GCC recognises new Syrian opposition Bloc, Aljazeera, 03 February 2013.

<<http://www.aljazeera.com/news/middleeast/2012/11/20121112175539534504.html>>.

¹⁹⁷ Arab League recognizes new Syrian opposition bloc, Reuters, 13 November 2012

<<http://www.jpost.com/Middle-East/Arab-League-recognizes-new-Syrian-opposition-bloc>>

¹⁹⁸ See above.

¹⁹⁹ France recognises Syria opposition coalition, 14 November 2012

<<http://www.aljazeera.com/news/middleeast/2012/11/20121113174633204988.html>>.

*Revolutionary and Opposition Forces as the legitimate representatives of the aspirations of the Syrian people.*²⁰⁰

The recognition of the NCSROF occurred just over a year after the recognition of the Libyan opposition groups. In both cases, confusing and unclear terminology was used that not only falls short of recognition but fails to show a clear intention to recognise.²⁰¹ Most of the statements were declarations of support rather than recognition because they contained the words 'acknowledge', 'accept' or 'consider' rather than 'recognise'. For instance, the United State announcement stated that:²⁰²

We have made a decision that the Syrian Opposition Coalition is now inclusive enough, is reflective and representative enough of the Syrian population that we consider them the legitimate representative of the Syrian people in opposition to the Assad regime.

This statement implies that recognition has not been granted but is still under political consideration. For a recognition statement to be valid, the statement must not only show clarity but contain statements that show an intention to grant recognition.

The use of clear statements when recognising a government is essential to avoid unnecessary confusion. Inappropriate terminology and unclear statements can be misleading and can lead to unjust results. What ought to be a simple statement of intention and confirmation of a *status quo* could lead to confusion such as questions about a government's legal *status quo*. Incorrect terminology not only wastes time but confuses real intention. Furthermore, it portrays the recognition of government as a political rather than a legal act.²⁰³ For instance, being declared as the representative of the aspirations of a people confers a different role, meaning and

²⁰⁰ Council of the European Union, Council Conclusions on Syria, Doc 16392/12, 19 November 2012 (<http://register.consilium.europa.eu>).

²⁰¹ Such statements contain words such as "recognise as the sole repository of governmental authority, the only legitimate interlocutor on bilateral relations." See Stefan Talmon "Recognition of Opposition Groups as the Legitimate Representative of a People" (2013) 12 *Chinese Journal of International Law* at 216–253, Christian Schaller "Siding with Rebels: Recognition of Opposition Groups and the Provision of Military Assistance in Libya and Syria (2011–2014)" in *From Cold War to Cyber War* (Springer Cham, 2016) at 251 to 263.

²⁰² Stefan Talmon "Recognition of Opposition Groups as the Legitimate Representative of a People" (2013) 12 *Chinese Journal of International Law* at 223.

²⁰³ Stefan Talmon "Recognition of Opposition Groups as the Legitimate Representative of a People" (2013) 12 *Chinese Journal of International Law* at 227.

intention from being declared as the representative of the people itself. As noted by Talmon:²⁰⁴

For a group to be recognised as the legitimate representative of the aspiration of the Libyan people, it must express the 'right' aspirations in the eyes of the recognising states; although it is not always clearly spelt out what these aspirations should be. Western European recognising states defined the legitimate aspirations of the Syrian people as convener of freedom, democracy and social justice.

Recognising a government as the sole legitimate representative of a state carries a significant level of clarity and intention, rather than the ambiguous statement of recognising it as the legitimate representative of the brotherly Syrian people. In the absence of an objective approach stating the process and methods of recognising governments, a state may not only err in its decision by the wrong use of terminology but tends to violate the sovereignty of another state by its recognition declaration (for example pre-mature recognition). Furthermore, confusion may easily arise as to whether a state intends recognition to occur or not.

3.5. Conclusion

This Chapter examined different problems relating to the recognition of governments in international law. It discussed the failure to distinguish between the recognition of states and governments; difficulties in distinguishing between political and legal recognition, and the use of unclear statements and ambiguous terminology in recognising governments. A primary cause of the recognition of government controversies is the lack of an objective approach to define the process and methods by which a government should be recognised.

Until the end of the Cold war, the effective control doctrine was the dominant approach for the recognition of governments. However, its adverse effects, because of its political character and non-binding nature makes it less desirable. Furthermore, because the effective control approach for recognising governments is the same as the statehood approach for recognising states, the confusion as to whether the recognition of state and the recognition of government should be conflated or treated separately continues to arise in matters of recognition.

²⁰⁴ Stefan Talmon "Recognition of Opposition Groups as the Legitimate Representative of a People" (2013) 12 Chinese Journal of International Law at 253.

At present, there exist no objective approach or any form of a treaty provision for the recognition of governments. International law continues to view the recognition of government as discretionary and at times, political or legal depending on how it suits. Therefore, recognition of government matters is replete with situations where a government is deemed politically legitimate by some states and illegitimate by others because each state continues to evaluate and recognises government through the approach that it chooses.

The author, therefore, concludes that the best solution to the recognition of government problems is the formation of an objective approach that would dictate the methods and process for recognising governments. This will solve the current debates on whether recognition of government is a legal or purely a political matter and resolve the meaning of recognition as applied to states and government. Also, an objective approach would put an end to the confusion that arises because of the use of various vague terminology and politically ambiguous recognition statement.

Chapter 4: States and Academics Approaches to the Recognition of Government Problem.

4.1. Introduction

Chapter Three of this study identified the lack of an objective approach as the major drawback of the recognition of governments. This Chapter sets out to identify the possible ways of improving the current situations. To this end, this Chapter reviews five different approaches (namely the Effective control doctrine, Thomas Jefferson approach, Carlos Tobar doctrine, Genaro Estrada doctrine and Democratic Legitimacy doctrine) that were developed from the seventeenth century until today to address the recognition of governments problem. The reason for selecting these approaches is that they have been subjects of debates both from within the states of their emergence and at the international level where they were adopted by states.

Studying the various approaches will help to get a better understanding as to the best possible solutions for the problems presented in the previous Chapters. Also, it establishes that while some of the approaches are appropriate in certain situations and resolves some of the recognition of government problems, they are inadequate in others. As such, the recognition of government remains under the spotlight of further studies and investigation.

4.2. State Solutions: The Seventeenth Century

A review of literature makes it clear that the Sixteenth century Westphalia treaty resulted in the formation of the modern state system and the development of the recognition of governments practice in the international law.²⁰⁵ The intention to which power would be consecrated in sovereign states rather than the higher authority of the Pope and the Emperor.²⁰⁶

With these developments, each state representative had the authority to act on behalf of the states, establish alliances and govern their respective states as long as they were in effective control of the state.²⁰⁷ During the Westphalia Era, this

²⁰⁵ See Chapter Two discussion on the Rationale behind the recognition of Governments in International Law.

²⁰⁶ Leo Gross "The Peace of Westphalia, 1648-1948" (1948) 42(1) The American Journal of International Law at 28

²⁰⁷ Marcilio Toscano Franca Filho "Westphalia: A Paradigm-A Dialogue between Law, Art and Philosophy of Science" (2007) 8 German Law Journal at 955 to 975.

manifested itself in various situations such as when a fraction as unconstitutionally overthrown a government or a new fraction ascend to power in a process not provided for in a state constitution. The below section provides a detail overview of the effective control doctrine which is the most dominant recognition of government approach as of today.

4.2.1. The Effective Control Doctrine: An Overview

Post-Westphalia, a government could only be recognised as the lawful representative of a state if it effectively established itself within a national territory, asserted authority by having the habitual obedience of its people, showed ability and willingness to fulfil obligations and in case of revolutions showed evidence of control with reasonable permanency.²⁰⁸ This doctrine, known as the effective control doctrine was the dominant traditional approach for recognising governments and benefitted from widespread support from states until the end of the Cold War.²⁰⁹

Academically, it first originated from the works of Hugo Grotius in the sixteenth century. However, it was rarely used by states until the seventeenth century when Emmerich de Vattel advanced the principle with more clarity. He explained that states lack the powers to interfere or pass judgment on the constitutionality of a national government irrespective of the origin or exercise, except they wish to declare war or enmity with the state.²¹⁰ The reason for Vattel's claim is that according to international law, a government brought into permanent power by a revolution or coup d'état is the legitimate government of the state whose identity is not affected by its origin. Further developed by Hans Kelsen under the grundnorm theory,²¹¹ and re enshrine in 1820 Alliances Declaration of Principles.²¹²

²⁰⁸ Hersch Lauterpacht "Recognition of Governments: II. III. The Legal Nature of Recognition and the Procedure of Recognition" (1946) Columbia Law Review at 91, 92

²⁰⁹ Joshua Downer "Towards a Declaratory School of Government Recognition" (2013) 46 Vand. J. Transnat'l L. at 590.

²¹⁰ According to Vattel, foreigners have no right to interfere in the domestic affairs of a State, they are not obliged to examine or pass upon the justice or injustice of its conduct in the management of them; they may if they think fit, presume that the sovereign in possession is the lawful one. When a Nation has driven out its sovereign, other powers which do not wish to declare war with it or arouse its enmity, consider it henceforth as a free and sovereign State, without taking it upon themselves to judge whether it has acted justly in throwing off the sovereignty of its former prince. Vattel, *Work Les Droit d Gen.* IV, ch. V, sec. at 68

²¹¹ General Theory of Law and State, Harvard ed., 1945 (hereinafter cited as "G.T.L.S.") at 118,

²¹² The principle states that Any state forming part of the European Alliance which may change its form of interior government through revolutionary means, and which might thus become a menace to other

A review of literature and state practices around the world shows that concerns associated with the emergence of power (origin of a government) and the test of effectiveness has factors that makes the effective control doctrine unsuitable. Below section explores a number of weaknesses associated with the effective control doctrine.

4.2.2. Critique of the Effective Control Doctrine

The advantages of the effective control doctrine are often overlooked by commentators who call for the abolishment of the approach.²¹³ The author of this thesis, however, identifies some significant advantage of the effective control doctrine that distinguishes it from other recognition of government approaches.

Realistically, the effective control doctrine has some advantages that make it more useful and better than the other recognition of government approach. For instance, a review of state practises shows the effective control doctrine as a substantive recognition of government approach that resolves the debates that recognition of government practices infringes on state sovereignty. It is so because the approach do not permit interference or an enquiry into the process by which a government comes into power before recognition is granted.²¹⁴ According to the principle of international law, today and universally accepted by states, under the effective control doctrine the capacity of a government to represent the state in its international relations does not depend in any degree on the constitutionality or origin of a government. The fact is that a usurper who in fact, holds power with the

states, will automatically cease to form a part of the Alliance, and will remain excluded from its councils until its situation gives every guarantee of order and stability. The Allied Powers not only formally declare the above to be their unalterable policy, but faithful to the principles which they have proclaimed concerning the authority of legitimate governments, they further agree to refuse to recognize any changes brought about by other than legal means. In the case of states where such changes have already taken place and such action has thereby given cause for apprehension to neighbouring states (it lies within the ability of the powers to take such useful and beneficent action) they will employ every means to bring the offenders once more within the sphere of the Alliance. Friendly negotiations will be the first means resorted to, and if this fails, coercion will be employed, should this be necessary.

²¹³ For instance, Christopher Le mon believed that the effective control doctrine Leaves little room for flexibility nor consideration to determine the would-be governments policies or principles. Christopher Le Mon, 'Unilateral Intervention by Invitation in Civil War: The Effective Control Test Tested' (2003) 35 International Law and Politics 741 at 745.

²¹⁴ Brad Roth "Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine" (2010) 11 Melbourne Journal of International Law at 2; Doswald-Beck "The Legal Validity of Military Intervention by Invitation of the Government" (1985) 56 British Yearbook of International Law BYIL at 194.

express or tacit consent of the nation, acts validly in the name of the state under the effective control doctrine.

To date, the effective control doctrine is the only recognition of government approach that finds expressions in various areas of international law principles such as the recognition of state and military intervention by invitation.²¹⁵ During civil strife, the effective control doctrine remains the only non-contested landmark decisive test for determining the faction best placed to speak on behalf of the state.²¹⁶ Although the effective control doctrine is not enshrined in any international instruments, it is recognised under customary international law and a general and consistent practice of states. Furthermore, the effective control doctrine is the only favoured recognition of government approach that has provided a clear basis for the conduct of international relations by ensuring that only the government that is in effective control is recognised.²¹⁷

The most significant disadvantage of the effective control doctrine is the antithetical nature of the principle to the "self-determination notion of the people's will" by overtly relying on the concept of "control" rather than popular acceptance as it means test. Also, neither is there a benchmark at the time of recognition under the doctrine in determining whether a putative government would effectively administer state functions despite been in control of the state conflict.²¹⁸ Nor is there any consideration for an enquiry into the process by which the government gains control. In effect, a government that comes into power through coup d'état or any other unconstitutional means could be recognised as long as it is in control of the state.²¹⁹ The process by which a government gains control and conducts itself under the

²¹⁵ The effective control doctrine is factual test for determining statehood and invitation for military assistances. See Colin Warbrick "Kampuchea: Representation and Recognition" (1981) 30 *International & Comparative Law Quarterly* at 473-82, Roland Rich "Recognition of states: The collapse of Yugoslavia and the Soviet Union" (1993) 4 *Eur. J. Int'l L.* at 36. Erika De Wet "The modern practice of intervention by invitation in Africa and its implications for the prohibition of the use of force" (2015) 26 *European Journal of International Law* at 998.

²¹⁶ Awol Kassim Allo "Counter-intervention, Invitation, Both or Neither: An Appraisal of the 2006 Ethiopian Intervention in Somalia" (2009) 3 *Mizan Law Review* at 220.

²¹⁷ Christopher Le Mon, 'Unilateral Intervention by Invitation in Civil War: The Effective Control Test Tested' (2003) 35 *International Law and Politics* 741 at 748.

²¹⁸ Christopher J Le Mon "Unilateral intervention by invitation in civil wars: the effective control test tested" (2002) 35 *NYUJ Int'l L. & Pol.* at 745.

²¹⁹ Christopher Le'Mon, 'Unilateral Intervention by Invitation In civil War: The Effective Control Test Tested' (2003) 35 *International Law and Politics* 741 at 745

doctrine is irrelevant.²²⁰ The key question is whether it has attained control. Despite these, little has been done to give a concrete definition of what constitutes control.

Although, some academics argued on effectiveness as the actual test rather than control for the effective control doctrine.²²¹ However, contentious questions arise as to whether effectiveness should be equated to the success of the government's ability to carry out functions and what duration of time should be judged before a regime is considered effectively successful to be recognised. While the court in *State v Dosso*²²² had decided that twenty-one days seems to be sufficient enough to make such determinations, the decision of the Privy Council in *Madzimbamuto v Lardner-Burke*²²³ that two years and eight months was insufficient to determine whether a regime will be effective caused more confusion than solutions. The reason been that waiting for such long periods before recognition is granted may affect the state in terms of some advantages discussed in Chapter Two.

Additionally, "*assert authority by the habitual obedience of the people*" constitute command rather than consent under the doctrine. Also, the lack of consideration for constitutionality that may arise as a result of maintaining control questions the continued use of the effective control doctrine from a moral angle.²²⁴ As expressed by the High Court of Lesotho in *Mokotso and Others v. H.M.King*

²²⁰ See comment of Justice Taft C.J. in the *Tinoco Concession Case* herein Great Britain v Costa Rica 1 RIAA 369(1923) at 381-2.

²²¹ Benedict Kingsbury "Judicial Determination of Foreign "Government" Status" (1993) 109 Law Quarterly Review at 377 to 382.

²²² The State v. Dosso [1958] P.L.D. 533a.

²²³ Madiimbamulo v. Lardner-Burke [1968] 3 All ER 561.

²²⁴ Since the question of constitutionality is irrelevant in the effective control doctrine, if a government can satisfy the granting state that it is in *de facto* control of the state. Martha Peterson "Recognition of governments should not be abolished." (1983) 77 *American Journal of International Law* at 37. See also, Per Professor Charles Hyde "No difficulty presents itself as normal when a change happens by abnormal processes, and such change is regarded as a mere incident in the life and growth of the state concerned. The situation is obscure, for the fact, that when a contest for governmental control is waged by force of arms, or by other processes not contemplated by national laws of the state involved, the completeness of the success of such contestant may be relatively open to doubt for a protracted period. See Stanley K Hornbeck "Recognition of Governments" (1950) 44 *Proceedings of the American Society of International Law* at 182, Danny Auron "The Derecognition Approach: Government Illegality, Recognition, and Non-Violent Regime Change" (2013) 45 *George Washington International Law Review* at 468.

Moshoeshoe II and Others, "Legality should be achieved if and only if the bulk of the people accept and approve, for in them lies political sovereignty."²²⁵

In recent times, additional factors such as absences of violence,²²⁶ abilities to fulfil legal obligation have been added by states.²²⁷ However, the addition of these factors in the practical sense does not address the problems associated with the effective control doctrine considering recognition of governments is necessary under unconstitutional circumstances.²²⁸ Instead, it creates the problem of variances in approach and inconsistencies in decisions, which were discussed in Chapter Two of this study as part of the reasons for the suggestions that recognition of governments should be abandoned in international law.²²⁹

4.3. State Solutions: The eighteenth Century

The French Revolution had a significant effect on the creation of the next recognition of government approach that became internationally recognised. The Revolution had begun as a result of systematic societal conflict between the bourgeoisie (lower class) and the nobilities (higher class) in the French territories.²³⁰ The conflict, which lasted for ten years resulted in the overthrow of King Louis Capet XVI and the eventual

²²⁵ *Mokotso and Others v. H.M. King Moshoeshoe II and Others* [1989] *Law Reports of the Commonwealth (Constitutional and Administrative Law Reports)* at 24-169.

²²⁶ British, Dutch, French, Italian, and United States non-recognition of the Karageorgevich Dynasty in Serbia, which was brought to power in 1903 by a coup resulting in the deaths of the former King and Queen, several of her relatives, and several ministers of the Government. See, Maria Aristodemou "Choice and Evasion in Judicial Recognition of Government: Lessons from Somalia" (1994) 5 *Eur. J. Int'l L.* at 534.

²²⁷ Doswald-Beck "The Legal Validity of Military Intervention by Invitation of the Government" (1985) 56 *British Yearbook of International Law* at 193.

²²⁸ For instance, the US claimed that control that is likely to be continuous and sustained is a sufficient prerequisite for determining effective control, while the United Kingdom requires permanent control as affirmed by its declaration that "We shall continue to decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control in the territory of the state concerned, and seem likely to continue to do so". However, a major difficulty that may arise in relation to the US assertion is the use of the words "continuous control". Armed conflict is at times prolonged and backed with extreme violence that may have grievous consequence for the economy of a state. See Robert Sloane "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 *Emory Int'l L. Rev.* at 125.

²²⁹ Chapter Five discusses further on the effective control doctrine.

²³⁰ Gail Bossenga "Origins of the French Revolution." (2007) 5 *History Compass* at 1295. See also Georges Lefebvre, *The Coming of the French Revolution*, trans. Robert R. Palmer (Princeton, NJ: Princeton University Press, 1947); Albert Soboul, *The French Revolution, 1787-1799*, trans. Alan Forrest and Colin Jones (New York, NY: Vintage Books, 1975). See, also, *The Feudal Structure of the Medieval World* <<http://library.thinkquest.org/10949/fief/hifeudal.html>> accessed on the 10th march 2014.

establishment of a new government declaring itself as the constitutional representative of the French territories.²³¹

The government, republican in characteristics was welcomed by the people due to one essential factor- the origin of the newly formed government was derived from the will of the people as opposed to the monarchism that was imposed governance.²³² However, at the international level, there were discrepancies as to whom to accord recognition considering the foreignness of the Revolution and the newly developed French government.²³³

While the effective control doctrine should have applied considering it was the only known approach for recognising government at the time, it was abandoned due to the failure of the French government to effectively fit into the monarchy system of governance it had overthrown.²³⁴

The French Revolution and the subsequent defeats of Napoleon changed the face of the effective control doctrine as a new approach that will suit the current recognition problem emerged.²³⁵ This new approach, as discussed below, became known as the Thomas Jefferson approach, and was adopted by most states until the twentieth century.

4.3.1. The Thomas Jefferson Approach: An Overview

The Thomas Jefferson approach emerged in 1793 from the United States and is named after the US Secretary of State, Thomas Jefferson who claimed that "to acknowledge any government to be rightful, it must be formed by the will of the nation, substantially declared."²³⁶ This approach also known as the popular

²³¹ Lynn Hunt, 'The Family Romance of the French Revolution (1992, University of California press, California) at 3

²³² At 232.

²³³ Thomas Jefferson assertions " It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared. The late government was of this kind and was accordingly acknowledge by all the branches of ours; so, any alteration of it shall be made by the will of the nation, substantially declared, will doubtless be acknowledged in like manner. With such a government every kind of business may be done." See Amos Hershey, "Recognition of New Governments" (1921) 15 The America Journal of International Law at 59.

²³⁴ Gregory Weeks "Almost Jeffersonian: US Recognition Policy toward Latin America" (2001) 31 Presidential Studies Quarterly at 492.

²³⁵ Gregory Weeks "Almost Jeffersonian: US Recognition Policy toward Latin America" (2001) 31 Presidential Studies Quarterly at 492.

²³⁶ Thomas Jefferson, Secretary of State, to Morris, Minister to France, November 7, 1792. MS Institution, Ministers at 215. See also, Amos S Hershey "Recognition of New Governments" (1921) 15 The American Journal of International Law at 59.

sovereignty was succinctly expressed, repeated, reworded and applied literally by different states for half a century as a solution to some of the recognition of government problems.²³⁷ For instance, in terms of the debates that recognition of government practices infringes on sovereignty and the right of citizens to choose their government rather than foreign nations, Jefferson's approach serves as a perfect solution to eradicate this problem. Also, with the adoption of Jefferson's approach by states the issues of states making recognition of government decisions on their political expediency are solved. It is simple, the will of the governed shall be the basis of recognition.

4.3.2. Critique of Thomas Jefferson's Approach

The decisive test of the Jefferson approach is "consent of the people". This means that recognition must be granted to any government, irrespective of its origin and method of the ascendancy of a state, provided it is the will of the people.²³⁸ It appears to be relatively simple and workable on a moral dimension compared to the effective control doctrine where effectiveness and unconstitutionality were significant setbacks. However, Jefferson's approach is problematic and cannot be considered as a solution to the recognition of government problems. Instead, it creates and advances the recognition of government terminology problems because the decisive test of determining what constitutes "formed by the will of the nation substantially declared," i.e. consent in unconstitutional circumstances where recognition is needed is difficult to ascertain.

²³⁷ Green H Hackworth, et al. "The Policy of the United States in Recognizing New Governments during the Past Twenty-Five Years" (1931) 25 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) at 121.

²³⁸ In 1856, President Pierce applied the principle to Nicaragua, stating that, "It is the established policy of the United States to recognize all governments without question of their source or their organization, or of the means by which the governing persons attain their power, provided there be a government de facto accepted by the people of the country, and with reserve only of the time as to the recognition of revolutionary governments arising out of the subdivision of parent states with which we are in relation of amity. We do not go behind the fact of a foreign government exercising actual power to investigate questions of legitimacy; we do not inquire into the causes which may have led to a change of government. To us it is indifferent whether a successful revolution has been aided by foreign intervention or not; whether insurrection has overthrown existing government, and another has been established in its place according to pre-existing forms or in a manner adopted for the occasion by those whom we may find in the actual possession of power. All these matters we leave to the people and public authorities of the country to determine; and their determination, whether it is by positive action or by ascertained acquiescence, is to us a sufficient warranty of the legitimacy of the new government". See Charles Cheney Hyde "Concerning the Recognition of New Governments by the United States" (1919) 13 The American Journal of International Law at 110.

Although, the approach resolved the debates that arose as a result of variances in state practice due to recognition of government been discretionary and based on the political expediency of states, it does shift focus to citizens consent. However, the problem with this approach is that the need to recognise a government arises only when there is a forcible overthrow of an existing government; accession to power of a new government by a procedure not provided for by the constitution of a state; or the continuance in power of an existing government in violation of constitutional procedures. The application of citizens' consent in all of these circumstances is impractical and unattainable.²³⁹

Also, in Jefferson's approach, there is suggestion of a contract between the people and the government. The contract, which clings to the exchange of power by the people for governance to secure certain obligations and inalienable rights puts constitutional accountability on governments. Of course, this is a good thing considering that government will be refrain from abusing their power since consent can easily be withdrawn when a government fails to fulfil its duties and obligations thus giving power to the citizens. An example is Egypt 2011, when Egyptians withdrew their consent and called for a democratic regime change against their autocratic leader, President Hosni Mubarak.²⁴⁰

Jefferson's approach is remarkable when considering the need to uphold accountability. However, the demerit that may occur is the encouragement of rebellion at the slightest provocation. Also, in some circumstances, foreign governments have to recognise insurgents against constitutionally elected governments whenever citizens withdraw consent or when a revolution is the will of the people against an incumbent government.

Also, Jefferson's approach consists of factors that internally place obligations on states relating to the respect of the people to make choices free from any foreign interference, thus promoting the self-determination rights of the people. However, Jefferson's failure to address what constitutes consent and how consent should be

²³⁹ All of these circumstances demonstrate situations where the constitution of a state would have collapse, as such, attaining consent through these procedures could be impractical and unattainable. For instance, obtaining citizen consent during the forcible overthrow of an existing government (coup situations) is unachievable.

²⁴⁰ Ozan O Varol "The Democratic Coup d'état" (2012) 53 Harvard International Law Journal at 292.

obtain further contributed to some of the shortcomings of the principle. Even when consent is gained, Jefferson's policy fails to address how it would be secure in circumstances where more than two governments are vying for authority.

Furthermore, Jefferson assumed that governments established by popular consent would be democratic in their dealings and would observe international law principles and treaties. However, this assumption is wrong as international law has over time witnessed cases of consented governments becoming authoritarian or undemocratic without any respect for the rule of law.

Except, there is a structure, or a defined form of rules determining consent, Jefferson's policy would continuously be problematic and not a solution per se to recognition of government problems. Against this background, in the foreseeable future, the use of Jefferson's approach as a measure to resolve the challenges of the recognition of governments is unlikely. Perhaps, had Jefferson projected a link between involuntary consent and constitutional legitimacy, Jefferson's approach of recognising a government base on the will of the governed substantially declared might have survived as the most compelling approach for the recognition of governments in international law.

4.4. State Solutions: The Nineteenth Century

While the newly formed Westphalia state system continued to spread to other continents, Central America hopes of integration with the modern system was repeatedly destroyed by internal strife. The conflicts between Manuel Estrada Cabrera of Guatemala and Jose Santos Zelaya of Nicaragua further threatened the Peace of Isthmus Treaty that had been signed by the Central America States.²⁴¹ By 1906 it had become clear that all five republics (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) that made up the Central America states were on the verge of War. In July 1906, onboard *U.S.S Marble* a truce was established between the five republics by Mexico and the United States.²⁴²

²⁴¹ Charles L Stansifer "Application of the Tobar Doctrine to Central America" (1967) 23 the Americas at 251.

²⁴² Charles Stansifer, 'Application of the Tobar Doctrine to Central America' 23 (1967) the Americas at 252.

In 1907, the Republics met with Mexico and the United States met at a conference in Washington DC and adopted numerous agreements, among which was not to recognise new governments that come to power as a result of *Coup d'etat* or revolution against the recognised government.²⁴³ This new agreement was incorporated into the General Treaty of Peace and Amity of 1907 initiated a new policy of recognition for Central America and was credited to the recognition suggestion of Dr Carlos Tobar, the foreign Minister of Ecuador and became known as the Carlos Tobar Doctrine.²⁴⁴

4.4.1. The Carlos Tobar Doctrine: An Overview

The Carlos Tobar Doctrine originated in 1907 from the suggestion of the then Foreign Minister of Ecuador as a solution to end usurpation of constitutional governments through non-recognition of governments that comes into power by unconstitutional means such as Coups or Revolution.²⁴⁵ Unlike the effective control doctrine²⁴⁶ and Jefferson's approach²⁴⁷, the Carlos Tobar doctrine was clear that unconstitutionality is an original recipe for disaster, the obstruction of peace and the promotion of instabilities. Peace and political stability will be attained in society by collective force and non-recognition of regimes that come into power by unconstitutional means against constitutional order.²⁴⁸

The Carlos Tobar doctrine operated for twenty-three years and was not generally accepted by states. For instance, Mexican Foreign Minister, Genaro Estrada, considered Tobar's doctrine "as nothing less than an intervention in the affairs of

²⁴³ Donald Marquand Dozer "Recognition in Contemporary Inter-American Relations" (1966) 8 Journal of Inter-American Studies at 321.

²⁴⁴ Charles L Cochran "The Development of an Inter-American Policy for the Recognition of de facto Governments" (1968) 62 American Journal of International Law at 27. Though the United States was not a signatory to the treaty, the attendance of US representatives and joint agreement by the representatives implied that the adoption was acceptable to the United States.

²⁴⁵ Charles Stansifer, 'Application of the Tobar Doctrine to Central America' 23 (1967) *The Americas* at 251.

²⁴⁶ Supports the recognition of a government irrespective of its origin.

²⁴⁷ Supports revolution as long as it is the will of the people.

²⁴⁸ As Suggested by Carlos Tobar, The America republics, for the sake of their own reputation and credit-if not for other humanitarian and altruistic considerations-ought to intervene indirectly in the internal dissensions of the continent. Such intervention might consist, at the least, in the denial of recognition to de facto governments springing from revolution against constitutional order. see Charles Stansifer "Application of the Tobar Doctrine to Central America" (1967) 23 *The Americas* at 251.

another state,"²⁴⁹ while, US Secretary of State Henry Stimson, "qualified the doctrine as contrary to international law."²⁵⁰ Furthermore, two of the five states that signed the treaty later rescinded their decision.²⁵¹ The recommendation adopted by the Commission of Jurists at the Sixth International Conference of American States that "No state has a right to interfere in the internal affairs of other states" saw to the demise of the doctrine.²⁵²

4.4.2. Critique of the Carlos Tobar Doctrine

It is unclear whether Tobar intended other states apart from the five American Republics to adopt the principle of state collective action in agreeing to the non-recognition of unconstitutional regimes. It remains clear that he intended the American states to act as a joint force. However, Tobar did not consider the origin and structure of recognition of government as a discretionary prerogative act which itself does not permit collective state action. He failed to consider evidence of state practices that the decision to recognise a government is a matter of a state political expedience as it carries with it a prerogative duty on the part of the state granting recognition. He further failed to consider the recognition of government as a unilateral act which indicates the willingness of a state to accord the government of another rights and amenities of intercourse between equal nations.²⁵³ For these reasons, Tobar's doctrine is distinctly unsuitable because it creates more recognition problems rather than a solution. Supportive ground for adopting Tobar's doctrine include the approach protecting state sovereignty and serving as the best ground for achieving constitutional stability. It is so because the doctrine deters ambitious revolutionary from revolt due to the fear and consequences of non-recognition.²⁵⁴ However, the doctrine is unsuitable because it departs from the fundamental principle of international law relating to non-intervention and counters

²⁴⁹ David Rai *Statehood and the law of self-determination* (Martinus Nijhoff Publishers, 2002) at 115.

²⁵⁰ At 249.

²⁵¹ Costa Rica and Guatemala.

²⁵² International Commission of Jurists, Public International Law Project No. II, reprinted in *American Journal of International Law*, XXII, Spec. Suppl. (1928) at 240.

²⁵³ Philip Marshall Brown "The Recognition of the Government of the Union of Soviet Socialist Republic" (1933) 11, *American Journal of International Law* at 290.

²⁵⁴ Donald Marquand Dozer "Recognition in Contemporary Inter-American Relations" (1966) 8 *Journal of Inter-American Studies* at 323. Political rights of citizens

the political right of a citizen to democratic revolution.²⁵⁵ Also, the doctrine exposes government seeking recognition to coercion by granting states the power to disapprove of its form, political tenets and composition. In effect, this supports the abolition theories that recognition of government questions the autonomy of states.

Concerning countering the political right of citizens to revolution, the Tobar doctrine interferes with the rights of the people to change their government, alter their constitutional system, and choose whomever they like to exercise political authority over their state. This promotes the abolition of recognition theory that the recognition of government questions the autonomy rights of citizens.²⁵⁶ Also, non-recognition under Carlos Tobar doctrine meant the passing of judgment on constitutional and legal intricacies of a state which the Judiciary was not prepared to deal with, and It also mean that behind every inquiry into the constitutionality of a government looms the use of force.

In the end, Tobar's solution to the recognition of government proved to be most unsuitable. Further, its risks being a contributing factor to unauthorised intervention and economic disaster.²⁵⁷ For example, Costa Rica was faced with economic disability due to its non-recognition and the Huerta regime in Mexico was able to legitimise itself and carry out its mundane duties despite its non-recognition. In effect, this shows the demerits of the Carlos Tobar Doctrine and its unsuitability as recognition of government approach.

4.5. State Solution: The twentieth Century

The next major recognition of government approach that emerged and was adopted by states as a solution to the recognition of government problem was the Estrada Doctrine. This doctrine, which deals with the abolishment of the recognition of government practices was not a spur of the moment decision, but a doctrine that

²⁵⁵ See Kalkidan Obse "The Arab Spring and the question of legality of democratic revolution in theory and practice: a perspective based on the African Union normative framework" (2014) 27 *Leiden Journal of International Law* at 817-838, Mark Thompson *Democratic Revolutions: Asia and Eastern Europe* (Routledge, 2003) and Irizarry Puente "The Doctrines of Recognition and Intervention in Latin America" (1954) 28 *Tulane Law Review* at 319.

²⁵⁶ Pamela Price "The Impact of Constitutive Recognition on the Right to Self-Determination: An Analysis of United States Recognition Practices Utilizing the Chinese Question as a Guide" (1979) 14 *Val. UL Rev* at 123.

²⁵⁷ George Baker "Woodrow Wilson's Use of the Non recognition in Costa Rica" (1965) 22 *The America* at 21.

emanated from Mexico's experience of foreign interference in its domestic affairs as a result of recognition.²⁵⁸ The overthrow, and murder of President Francisco Madero in 1913 by the revolutionary coup regime of Jose Victoriano Huerta. Also, the US denial of recognition to Huerta, followed by deadly indecisive armed conflicts between the revolutionary troops of Venustiano Carranza, Francisco Villa, and Emiliano Zapata in 1914 were part of Mexico decisions to abolish recognition of governments. Mexico assumed the position that recognition of government violates the autonomy of a national government, by subjecting it to the mercy of foreign governments who have the prerogative to grant recognition. He also felt that an enquiry into the constitutionality of a government constitutes interferences in the political affairs a state.²⁵⁹

4.5.1. The Genaro Estrada Doctrine: An Overview

The Estrada Doctrine is named after the Mexican Secretary of Foreign Relations, Senor Don Genaro Estrada whose recognition of governments approach centres on the abolition of the recognition practices.²⁶⁰ The Estrada Doctrine begins with stating Mexico's experiences on the effects of recognition and its new position that foreign government passing judgment on the legitimacy or illegitimacy of a government subordinates national authority to international opinion.²⁶¹ He further reinstated Mexico position of withdrawing from the recognition of government practices and its new position of recognising diplomatic representatives instead of governments.

²⁵⁸ Philip C Jessup "The Estrada Doctrine" (1931) 25 The American Journal of International Law at 719 -20.

²⁵⁹ Estrada stated "After a very careful study of the subject, the government of Mexico has transmitted instructions to its minister of Charges d' Affaires in the countries affected by the recent political crises, informing them that the Mexican Government is issuing no declarations in the sense of grants of recognition. Since our nation consider that such a course is an insulting practice that offends the sovereignty of other nations and one which implies that judgement of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume. In effect, an attitude of criticism, when they decide, favourably or unfavourably, as to the legal qualification of foreign regimes. Therefore, the government of Mexico confines itself to the maintenance or withdrawal, as it may deem advisable and in so doing, it does not pronounce judgement, either perceptibly or *posteriori*, regarding the right of foreign nations to accept, maintain or replace their governments or authorities.

²⁶⁰ Philip C Jessup "The Estrada Doctrine" (1931) 25 The American Journal of International Law at 719

²⁶¹ Charles L Cochran "The Development of an Inter-American Policy for the Recognition of de facto Governments" (1968) 62 American Journal of International Law at 28

4.5.2. Critique of Genaro Estrada Doctrine

Theoretically, many arguments favour the Estrada Doctrine of abolishment of the recognition of government practices. These include the recognition of government problems discussed in Chapter Two and Three of this study that the recognition of governments opens the way to abuse of power, infringements on state sovereignty and diplomatic/legal confusion and promotes hostility against other governments.²⁶² Furthermore, some states have abandoned the practice of recognising governments²⁶³ and the consequences of non-recognition have diminished.²⁶⁴ Also, the functions of a recognised government could easily be performed by state representatives such as diplomats and consular missions.²⁶⁵

However, as discussed in Chapter Two, there are also reasons to reject the Estrada's Doctrine.²⁶⁶ Recognition of governments plays a vital role in the socio-economic and political life of a state.²⁶⁷ For example, it ensures that only a regime that deserves recognition is accepted as the government. It also informs government agencies and nationals of recognising states that a regime is the legitimate government of a state.²⁶⁸ A lack of recognition would not only affect state relations and international co-operation in the fields of scientific research, military assistance, health and international trade but would create a significant vacuum.²⁶⁹

²⁶² Pieter Kuyper "Recognition: Netherlands Theory and State Practise" in C Flinterman "H. Van Panhuys, WP Heere, JW Josephus Jitta, Ko Swan Sik and AM Stuyt,(eds.), International Law in the Netherlands, Vols. I-III, Sijthoff & Noordhoff, Alphen aan den Rijn, Oceana Publications Inc., Dobbs Ferry 1978" (1983) 30 Netherlands International Law Review at 371-403.

²⁶³ For example, Mexico believed that the rules that determine the recognition of a government within the international sphere conflict with some enshrined principles of international law and described the recognition of governments as an insulting practice.

²⁶⁴ The United Kingdom and Mexico for example, declared that it was not their policy to recognise governments. However, in 2011, the United Kingdom openly recognised the Libyan opposition.

²⁶⁵ However, some circumstances make this impossible. For example, not all states have diplomatic relationships. At present, North Korea has no diplomatic relations with the US and South Korea. Furthermore, not all states maintain diplomatic missions in other states. For instances, Nigeria does not have a diplomatic mission in New Zealand. Diplomatic issues are dealt with by the Nigerian consulate in Australia.

²⁶⁶ Charles L Cochran "The Development of an Inter-American Policy for the Recognition of de facto Governments" (1968) 62 American Journal of International Law at 29

²⁶⁷ For a detailed discussion, see Chapter two.

²⁶⁸ Martha Peterson "Recognition of governments should not be abolished" (1983) 31 *American Journal of International Law* at 31.

²⁶⁹ The functions and importance of the recognition of governments to states and international law were discussed in detail in Chapter two.

Estrada is arguably correct in his theoretical assertion that the recognition of governments in international law is an insulting and degrading act that passes a favourable or unfavourable opinion on the legality of a national government.²⁷⁰ This contrasts with the advantageous nature and meaning of the recognition of governments in international law because once recognition has been granted, an invisible stamp of approval denotes an informal contract between the granting and the seeking state.²⁷¹ For instance, state A can ask for economic, financial and military assistance from state B (the grantor of recognition). Should state B's sovereignty be violated, it can call on the government of state A for military aid and protection of its sovereignty.²⁷² Such arrangements promote peace, and friendly multilateral relations among states, which is unmistakably the purpose of international law.²⁷³

However, Estrada did not consider three main pertinent issues in his distinction that the role of a recognised government could easily be substituted for Diplomats when calling for the abolition of recognition.²⁷⁴ Firstly, not all states have diplomatic missions. Some states do not engage in diplomatic relations, while some states have broken diplomatic ties with other states as a means of displaying disapproval or imposing sanctions. Secondly, diplomats in foreign missions lack the clarity and consistency in political and legal matters that ordinarily could be addressed by a government. Finally, as discussed in Chapter Two, not all states have diplomatic missions or the financial capacity to establish them in all the recognised states in the world. Undeniably, the doctrine embraces unfettered sovereignty and rejects interferences. However, abolishing the recognition of governments is not the most logical solution to the recognition of governments problem as discussed in Chapter Two.

²⁷⁰ Chandler P Anderson "Our Policy of Non-Recognition in Central America" (1931) 25 The American Journal of International Law at 299.

²⁷¹ See the discussion on confers legal personality

²⁷² An example cited in Chapter two was the military assistance rendered to Mali during the violation of the state sovereignty.

²⁷³ *S.S Lotus Case* [1927] PCIJ (Ser.A) 10 at para. 18 "International law governs relations between independent States. The rules of law binding upon States, therefore, emanate from their free will as expressed in conventions or by usage accepted as expressing principles of law and established to regulate the relations between co-existing independent communities or to (or "intending to") the achievements of common aims."

²⁷⁴ Charles L Cochran "The Development of an Inter-American Policy for the Recognition of de facto Governments" (1968) 62 American Journal of International Law at 29

4.6. Recent Practice: Scholar Solutions

In recent times, some scholars have argued that the best way to address the problems surrounding the recognition of governments is to recognise governments that adhere strictly to a norm of democratic legitimacy.²⁷⁵ They believe that the use of democratic legitimacy, a system of governance that relies on democracy as the only means of deciding the rightful authority holder in a state will end the ongoing debates surrounding the recognition of governments.²⁷⁶

Following the restoration of President Jean-Bertrand Aristide in Haiti (1992) and President Ahmad Tejan Kabbah in Sierra Leone (1997), as well as the failure of the August Coup in the Soviet Union (1991); one of the most prominent academics of the democratic legitimacy debate, Thomas Franck published a path-breaking article that postulated that a new era had emerged with the recognition of governments practice.²⁷⁷ Franck stated that the world is moving toward a norm of democratic entitlements that would guarantee global peace, stability, and transformation in the socio-economic and political development of states. Referring

²⁷⁵ Thomas M Franck "The Emerging Right to Democratic Governance" (1992) 86 at 46-91. Francis Fukuyama "The End of History?" (1989) *The National Interest* at 3-18, Sean D. Murphy "Democratic Legitimacy and the Recognition of States and Governments" (1999) 48 *The International and Comparative Law Quarterly* at 545-581, Samuel P Huntington *The Third Wave: Democratization in the late twentieth century* (University of Oklahoma press, 1993) at 31. For a general view of the debate see Steven Wheatley "The Security Council, Democratic Legitimacy and Regime Change in Iraq" (2006) 17 *European Journal of International Law* at 531-551, Jean d'Aspremont "The rise and fall of democracy governance in international law: A reply to Susan Marks." (2011) 22 *European Journal of International Law* at 549-570. Of recent, Erika De Wet "From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition" (2014) 108 *American Journal of International Law* at 201-207 and Obiora Chinedu Okafor "Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet" (2017) 108 *AJIL Unbound* at 228-232.

²⁷⁶ Steven Wheatley defined democratic legitimacy as a system of governance that depends upon the will of the people to be governed by those in power in Steven Wheatley "Democracy in International Law: A European Perspective" (2002) 51 *International and Comparative Law Quarterly* at 236. Anthony Laden asserts that democratic legitimacy refers to the process of governance based on the consent of the governor. The Bucharest Declaration, adopted by states at the Third International Conference of the New or Restored Democracies, asserts: "[there exists] an almost universal recognition that a democratic system of government is the best model to ensure a framework of liberties for lasting solutions to the political, economic and social problems that our societies face" See: UN Doc A/52/33. Academics like Thomas Franck "The emerging right to democratic governance" (1992) 86 *American Journal of International Law* at 46-91, assert that democratic legitimacy is the best type of governance to ensure citizens' democratic entitlement.

²⁷⁷ Thomas Franck "The emerging right to democratic governance" (1992) 86 *American Journal of International Law* at 50.

to the pro-democratic intervention of non-state actors in restoring democracy in Haiti (1992), and the failed coup in the Soviet Union, he asserted that:²⁷⁸

We are witnessing a sea change in international law, as a result of which the legitimacy of each government someday will be measured definitively by international rules and processes. We are not quite there, but we can see the outlines of this new world in which the citizens of each state will look to international law and organisations to guarantee their democratic entitlements. For some states, that process will merely embellish rights already protected by their existing domestic constitutional order. For others, it would be the realisation of a cherished dream.

According to Franck, it is clear that the international community is no longer indifferent to the constitutionality of regimes seeking recognition; it expects governments to be democratic.²⁷⁹ As such, democracy as a approach for recognising governments has emerged in international law. Frank and other legal academics cite general acceptance of democracy among states, and in states where democracy was rarely applied as evidence for these claims.²⁸⁰

4.6.1. Democratic Legitimacy Debate: An Overview

Before the Haiti intervention, democracy was seldom used in recognition of governments practice because most states subscribed to the 1987 American Law Institutes Restatement, which states that "International law does not address constitutional issues, such as how a national government is formed."²⁸¹ Furthermore, the assertion of a right to democracy would have proposed a approach for the

²⁷⁸ Thomas Franck "The emerging right to democratic governance" (1992) 86 *American Journal of International Law* at 50

²⁷⁹ Susan Marks "The End of History-Reflections on Some International Legal Theses" (1997) 8 *Eur. J. Int'l L.* at 430-40.

²⁸⁰ For a general overview of this debate, see Sean D Murphy "Democratic Legitimacy and the Recognition of States and Governments" (1999) 48 *International and Comparative Law Quarterly* at 545-581, Jean Aspremont "The Rise and Fall of Democratic Governance in International Law: A reply to Susan Marks" (2011) at 549 -570. Of recent, Erika De Wet "From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition" (2014) 108 *AJIL Unbound* at 201-207.

²⁸¹ This belief, which can be traced to the formation of the state system, dates back to the sixteenth century when interference in the domestic affairs of governments was regarded as a violation of internal sovereignty. See, American Law Institute, Restatements (third) of the Foreign Relations Law of the United States, 203, comment e (1987) in Gregory H Fox & Brad R Roth "Introduction: The Spread of Liberal Democracy and Its Implications For International Law" (2000) 1 *Democratic Governance and International Law* at 1

constitutionality of states, which would have been at odds with other prevailing recognition practices.²⁸²

However, given states reaction to Haiti, democratic legitimacy academics such as Susan Marks believe that "recognition of a government is no longer an issue left for the domestic constitution of states. The legitimisation of regimes has shifted dramatically such that international law has begun to embrace a norm of democratic governance."²⁸³ Roland Axtmann concurs "It is no longer the case that, as long as there is a sufficiently high degree of effective control, a state's border is protected from scrutiny by the principle of state sovereignty. Rather, for a state to be considered legitimate, it has become necessary to demonstrate that it rules with the consent of the governed."²⁸⁴

Other academics contend that democratic legitimacy has begun to acquire the status of a norm within customary international law with regards a government recognition. For example, in a 20-year review of democratic legitimacy as an approach for the recognition of governments in Africa, Erika De Wet claimed that democratic legitimacy "was becoming an additional or even alternative replacement approach to the effective control doctrine."²⁸⁵ Justifying her argument from state and institutional practice, Erika De Wet affirms that the international community's rejection of the internal overthrow of democratic governments, and states' refusal to recognise usurpers provides strong evidence of the acceptance of democratic legitimacy.²⁸⁶ Gregory Fox and Brad Roth agree by affirming that:²⁸⁷

It is now clear that international law and international organizations are no longer indifferent to the internal character of regimes exercising effective control within sovereign states. In region after region, political change has swept through the former

²⁸² For example, the effective control doctrine is recognised as the most sufficient approach for recognising governments during armed conflicts.

²⁸³ Susan Marks "The End of History-Reflections on Some International Legal Theses." (1997) 8 *Eur. J. Int'l L.* at 460.

²⁸⁴ Given this transformation, regimes that exhibit democracy find themselves at ease with governance, while undemocratic regimes find themselves moving towards people's democracy to validate their governance. See Roland Axtmann *Democracy: Problems and Perspectives: Problems and Perspectives* (Edinburgh University Press, 2007).

²⁸⁵ Erika De Wet "From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition." (2014) 108 *AJIL Unbound* at 203

²⁸⁶ Erika De Wet "From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition." (2014) 108 *AJIL Unbound* at 203.

²⁸⁷ Gregory H Fox & Brad R Roth "Democracy and international law" (2001) 27 *Review of International Studies* at 328.

bastions of authoritarian and dictatorial rule, offering the promise, if not always the reality, of democratization, and this development has been reflected in international institutions.

The UN Secretary-General's assertion of an established norm dissuading "military coups against democratically elected governments by self-appointed juntas"²⁸⁸ and the UN Security Council imposition of sanctions against the military junta that overthrew the constitutional government of Sierra Leone align with these claims.²⁸⁹ Academics also observe that the maintenance of quality democracy in some European and Pacific nations, coupled with the introduction of a broad range of democratic mechanisms, prove that democratic legitimacy is here to stay.²⁹⁰

The 2016 Global Democracy rankings, which show a remarkable increase in the movement towards democracy in the Middle-East and Africa, where democracies were rarely accepted, buttress these arguments.²⁹¹ This is despite Steven Wheatley's warning that, while "it might not yet be possible to identify a general obligation on states to introduce democratic government, the recognition that a democratic system of government may not legitimately be replaced by an authoritarian one and that an unconstitutional government won't be recognised indicates a progressive acceptance of democratic legitimacy."²⁹²

4.6.2. Critique of Democratic Legitimacy

As stated in Chapter One, there is a lack of conceptual clarity on the definition of democracy, what it entails, and the basis upon which any action may be taken in the name of democracy.²⁹³ The UN Charter and the League of Nations did not mention or make reference to the word democracy.²⁹⁴ International law has also not affirmed a single definition of democracy. As a result, large numbers of states proclaim support

²⁸⁸ See SC Res. 940 (1994) (authorizing armed intervention in Haiti); UN Doc. S/PRST/1998/5 (Security Council Presidential Statement welcoming the removal of the Sierra Leonean junta); S.C. Res. 1162 (1998) (commending ECOWAS after the fact for its role in the Sierra Leonean transition).

²⁸⁹ Annual Report of the Secretary-General on the Work of the Organization, UN Doc. A/52/1 (1997), para. 37.

²⁹⁰ Roland Rich "Bringing democracy into international law" (2001) 12 *Journal of Democracy* at 20-34.

²⁹¹ Progress in World's Democratic Quality: Democracy Ranking (2016) 03 May. 2017 <<http://democracyranking.org/>>

²⁹² Steven Wheatley "Democracy in international law: a European perspective" (2002) 51 *International & Comparative Law Quarterly* at 234.

²⁹³ For a detailed argument on this issue, see Richard Bruchill in Richard Burchill "The Developing International Law of Democracy" (2001) 64 *The Modern Law Review* at 124.

²⁹⁴ Larry Diamond "Is the third wave over?" (1996) 7 *Journal of democracy* at 22.

for democracy and its associated values, without any real agreement on the meaning of democracy or the means by which it should be given effect.²⁹⁵

Academics define democracy in different ways.²⁹⁶ A universal definition is ambiguous because democratic practices differ, and democracy as a concept was originally a process- and action-orientated as an ideology for struggle and freedom.²⁹⁷ As such, it appears to be everything and nothing.²⁹⁸ Few studies tend to be satisfied with the use of procedural or substantive definitions of democracy,²⁹⁹ the essential distinction between purely procedural models and more substantive visions of democracy is a challenge. Considering the ambiguity that revolves around whether democracy involves or entails certain outcomes, certain right and just outcomes, or whether democracy is purely procedural or whether the views of the majority prevail.³⁰⁰

However, several academics have criticised reliance on both substantive and procedural approaches to the definition of democracy. For instance, Martti Koskenniemi argues that “both procedural and substantive theories of democracy leave aside powerful aspirations that are neither about procedural correctness nor about political participation.”³⁰¹ Also, considering that substantive definitions of democracy are under inclusive in that they often tend to presuppose a consensus on what constitutes just or fair outcomes and to impose particular substantive visions

²⁹⁵ David Wippman "Defending Democracy Through Foreign Intervention" (1996) 19 Hous. J. Int'l L. at 664.

²⁹⁶ Niels Petersen "The Principle of Democratic Teleology in International Law" (2008) 34 Brook. J. Int'l L. at 33.

²⁹⁷ Marks, Susan "The End of History-Reflections on Some International Legal Theses" (1997) 8 *Eur. J. Int'l L.* at 430.

²⁹⁸ Susan Marks noted that in some cases, modifying adjectives were used in conceptualising democracy (one-party democracy, people's democracy, etc.); in other cases, the appropriation was unmodified. Either way, observers found normative inferences challenging to draw, for democracy appeared to mean everything and therefore nothing. Susan Marks "The End of History-Reflections on Some International Legal Theses." (1997) 8 *Eur. J. Int'l L.* at 430.

²⁹⁹ Joseph A Schumpeter *Capitalism, Socialism and Democracy* (Routledge, 2013) at See also, Joseph A. Schumpeter "Capitalism, Socialism, And Democracy" (2010) 16 International Journal of Cultural Policy at 20.

³⁰⁰ James Allan "Liberalism, Democracy, and Hong Kong" (1998) 28 Hong Kong LJ at 156.

³⁰¹ Martti Koskenniemi "Whose Intolerance, Which Democracy?" (2000) Democratic governance and international law at 436.

where they are neither appropriate nor useful.³⁰² It creates more problem than solution as an approach for recognising governments.

The definition of democracy put forward by Joseph Schumpeter relates to an electoral process in the sense that the democratic method is an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote remains the most influential definition today.³⁰³ However, this definition relies on an electoral process that is attainable through the people's vote and an institutional arrangement that is not achievable when the needs to recognise a government arises in international law.³⁰⁴

This is not to say that democracy does not elucidate the rule of law and bridges the gap between the people and the government in the sense that the government competes for the people's vote and the people express their individual right to governance through elections. However, elections which are free, and fair can only be achieved in a stable state. Election cannot happen during armed conflicts nor coup. Therefore, the assertion that democracy would be a suitable replacement of the effective control doctrine is controversial.

In slight contrast to Schumpeter's definition, David Beetham offers a broader definition that comprises popular participation.³⁰⁵ However, this definition remains problematic because of its contradiction of the principle of state sovereignty and autonomy."³⁰⁶ The usefulness of democracy as a approach for the recognition of

³⁰² Molly Beutz "Functional democracy: Responding to failures of accountability" (2003) 44 *Harv. Int'l LJ* at 401

³⁰³ Joseph A Schumpeter *Capitalism, Socialism and Democracy* (Hamper Brother, New York, 1942) at 269.

³⁰⁴ Joseph A Schumpeter *Capitalism, Socialism and Democracy* (Hamper Brother, New York, 1942) at 269.

³⁰⁵ David Beetham *Democracy and human rights* (Polity Press, Cambridge, 1999) at 90 to 91. According to Beetham, the core idea of democracy is that of popular vote or popular control over collective decision-making. Its starting point is with the citizen rather than with the institutions of government. Its defining principles are that all citizens are entitled to a say in public affairs, both through participation in government and that this entitlement should be available in terms of equality to all. Control by citizens over their collective affairs and equality between citizens in the exercise of that control are the basic democratic principles.

³⁰⁶ UN GA Res 45/150 (18 December 1990). Acknowledging this problem, the UN General Assembly reiterates that "the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right freely to choose and develop its political, social, economic, and cultural systems, whether or not they conform to the preferences of other states.

governments is therefore questionable, especially in instances where the constitution of a state has collapsed, and an electoral structure cannot be formulated.

4.7. Conclusion

Discussion on the recognition of government controversies have occurred over a number of decades. To date, such discussion has not resulted in effective measures. This is because most of the recognition of government approaches has remained controversial, thus leaving states and academics at variances on how best to address the problems affecting this area of international law.

Some academics advocated for the continuous use of the effective control doctrine which has been in substantial existence for decades. However, it has been criticised for several reasons. Compared to other recognition of government approach such as the Carlos Tobar doctrine, the effective control doctrine is antonymic to the self-determination of the people. In fact, to date, the doctrine relies on the level of effectiveness and control of a faction rather than self-determination of the governed as basis of recognition. Furthermore, the doctrine promotes unconstitutional regime changes, these among others are part of the reasons why some states are reluctant on the continuous use of the doctrine.

Jefferson's approach introduced by the US Secretary of State, Thomas Jefferson, was another possible approach for the recognition of government. However, the problem of determining the "will of the nation" in an unconstitutional circumstance such as armed conflicts or coups makes Thomas Jefferson approach an impractical solution in reality.

The continuous armed conflicts that affected the Central American states in the nineteenth century demonstrate great possibility in the eradication of some but not all of the recognition of government controversies with the Carlos Tobar doctrine. Considering that basically, the doctrine calls for collective action and the non-recognition of governments that are unconstitutional, which is a more realistic. However, unlike the other recognition of government approach, the problem with Carlos Tobar doctrine is not the nature of the approach itself in terms of definition, but rather the way which collective action would be executed and the effect of non-recognition.

Some state and studies have indeed called for the abolishment of recognition of governments with claims that the role of a recognised government can be substituted by diplomats and the consequences of non-recognition has diminished in international law. However, the review of several situations in this study shows that the nonrecognition of governments is undesirable and carry more weighty repercussions than the recognition of government. For instance, states would not be able to determine the legitimate authority in a state, thereby prolonging conflicts. Refusal to recognise a government would also serve as a means of indicating severe disapproval and sanctions, particularly in a world where the benefits of recognition such as military assistance and aid, are of great importance.

States and some academics have recently devoted their attention to the recent norm of democratic legitimacy; they are so focused on recent pro-democratic intervention that they have overlook that the implementation of this proposal is beset with difficulties. They have claimed that the doctrine is the best solution to the recognition of government approach, and it would replace the effective control practice. The lack of a conceptual definition of democracy and the basis by which action should be taken in the name of democracy has been ignored by these scholars. Hence, the next Chapter reassesses the claims in favour of democratic legitimacy as a recognition of government solution and a sustainable replacement of the effective control doctrine.

Chapter Five: Comparative Analysis of the Effective Control Doctrine and Democratic Legitimacy

5.1. Introduction

Chapter four of this study examined Five approaches put forward by some states and academics for the improvement and elimination of the recognition of government problems. The author concluded that most of these approaches are either unsuitable or unsustainable. This Chapter aims to establish whether democratic legitimacy will be a suitable solution and a sustainable replacement of the dominant recognition of government approach (the effective control doctrine) as put forward by some academics. To this end, this Chapter consists of four main sections.

The first section establishes the effective control doctrine and democratic legitimacy norm are sufficiently comparable, in so doing, the Chapter explains the reasons for adopting a comparative analysis by studying the similarities and disparities between the two principles. The second section provides an overview of democratic legitimacy, the discussion in this section centres on outlining the most significant feature of democratic legitimacy based on the result of the comparative analysis. The third section of this Chapter practically illuminates the main barriers of democratic legitimacy as an approach for the recognition of governments in international law using Haiti and Libya as case studies. The fourth section of this study concludes the presented analysis.

A comparative analysis of both the effective control doctrine and democratic legitimacy is a new and interesting discourse that will throw light on whether the acclaimed norm of democratic legitimacy will be a suitable solution and a sustainable replacement of the effective control doctrine. Also, a comparison of the similarities and the differences between the two approach will reflect their variables which would help construct validity on the best of the two approaches and help identify that the current effective control is better modified than abandon by states.

5.2. The Effective Control Doctrine and Democratic Legitimacy: What Suitability?

The effective control doctrine shows attractive characteristics having been in existence for decades and succeeded in other areas of international law such as intervention by invitation. However, when considering the author's observations on

the unsuitability of the effective control doctrine in Chapter four of this study, the effectiveness of the doctrine in its current form when practically applied is unclear in terms of resolving all the recognition of government concerns. Furthermore, it is vital to investigate that, if states agree to a uniform approach in the future for the recognition of governments in international law, would democratic legitimacy or the current effective control doctrine serve as the most suitable approach for use? Particularly, will it address the concerns of states and academics with regard the recognition problems? It is against this background that a comparative analysis of the effective control doctrine and democratic legitimacy will be carried out in the next section to identify the differences and similarities between the two approaches and establish their most compelling features as discuss below:

5.2.1. Similarities between the Effective Control Doctrine and Democratic Legitimacy

5.2.1.1. Connection to Customary International Law Principle

Although the nature and structure of the effective control doctrine and democratic legitimacy approach are not identical, by comparing both approaches, one finds some clear similarities. For example, in all the recognition of government approaches examined in this study, both the effective control doctrine and democratic legitimacy are the only recognition of government approach that are connected to a broader established principle that is evident in customary international law. As discussed in Chapter Four, the effective control doctrine finds expressions in various areas of international law principle, such as the recognition of state and military intervention by invitation.³⁰⁷ During civil strife, the effective control doctrine remains the only non-contested recognition test for determining the faction best placed to speak on behalf of the state.³⁰⁸ Similarly, democratic legitimacy is enshrined in international law

³⁰⁷ The effective control doctrine is factual test for determining statehood and invitation for military assistances. See Colin Warbrick "Kampuchea: Representation and Recognition" (1981) 30 *International & Comparative Law Quarterly* at 473-82, Roland Rich "Recognition of states: the collapse of Yugoslavia and the Soviet Union" (1993) 4 *Eur. J. Int'l L.* at 36. Doswald-Beck "The legal validity of military intervention by invitation of the government" at 189 to 252. Erika De Wet "The modern practice of intervention by invitation in Africa and its implications for the prohibition of the use of force" (2015) 26 *European Journal of International Law* at 998.

³⁰⁸ A detail explanation is of the effective control as the only applicable recognition test during conflict or coup is discussed in Chapter 7 in relation to Libya ongoing conflict. See Awol Kassim Allo "Counter-

principles such as democracy, political and self-determination rights. Likewise, after revolution and at times civil strife, democratic legitimacy remains the only non-contested recognition test for determining the faction best placed to speak on behalf of the state through electoral processes.

5.2.1.2. Enshrined in International Law Instruments

Another fundamental similarity between the two approaches is that both the effective control doctrine and democratic legitimacy are the only recognition of governments approach that is enshrined in International law instruments. Democratic legitimacy is embodied in Article 21 of the Universal Declaration of Human Rights³⁰⁹ and Article 25 of the ICCPR.³¹⁰ Similarly, the effective control doctrine guiding principle is enshrined in Article 2(4) of the United Nations Charter and Hague Convention (IV) respecting the Laws and Customs of War on Land (annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land; 205 CTS 277).³¹¹

5.2.1.3. Tested and Undergone Different State Practices

Also, despite the differences in the components of the effective control doctrine and democratic legitimacy, both approaches are tested and could be considered a norm of customary international law having undergone different state practices. In Libya (2011), oppositions were recognised by states based on democratic legitimacy. Similarly, Zimbabwe (2017) coup usurpers were recognised against the incumbent government of President Robert Mugabe based on the effective control doctrine.

intervention, Invitation, Both or Neither: An Appraisal of the 2006 Ethiopian Intervention in Somalia" (2009) 3 Mizan Law Review at 220.

³⁰⁹ Article 21(3) of the UDHR specifically requires that the will of the people shall be the basis of the authority of government. This will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures

³¹⁰ The ICCPR came into force 21 years after the UDHR laid the foundation for the right to the democratic legitimacy component of internal self-determination, stresses that states must respect and promote the principle of self-determination, and citizens' right to determine their political status and freely pursue their economic, social and cultural development. It states that All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. The state parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

³¹¹ Hague Convention (IV) respecting the Laws and Customs of War on Land, opened for signature 18 October 1907 (entered into force 26 January 1910) annex (Regulations respecting the Laws and Customs of War on Land') S3.

Thus, it can be concluded from this brief discussion on the similarities between the effective control doctrine and democratic legitimacy that both approaches have a pedigree, determinacy and coherence in established international law norms, state practices and international instruments.³¹² Therefore, it makes sense to draw a comparison from both approaches (than other recognition of government approach) because they have both commonly observed actual compliance, addressed by a rule of law and rulemaking institutions. Importantly, both approaches have operated under accepted principles of international law (other than recognition of government) to warrant an investigation into their suitability and sustainability as recognition of governments approach.

5.2.2. Differences between the Effective Control Doctrine and Democratic Legitimacy Approach

Having identified that the effective control doctrine and democratic legitimacy have similar connections relating to an established international law norm, state practices and international instruments, it is the aim of this section to examine the disparity between approaches to identify their disadvantages and also, to construct a conceptual map to answer the research question. To achieve this the following criterion

5.2.2.1. Constitutionality Promotion

Democratic legitimacy is said to promote constitutionality because it is the key to political stability, conflict resolution, global peace and is increasingly regarded as a means of preventing internal armed conflict and promotion of human rights.³¹³ Academics cite the cooperative foundation of democratic states, maintenance of liberal peace and statistics on the war between democratic and non-democratic

³¹² By pedigree, determinacy and coherence the author refers to (a) the depth a rule in historical process (b) The rule's internal consistency and lateral connectedness to the principles underlying other rule; (C) The rule's ability to communicate content.

³¹³ M W Doyle "Kant, Liberal Legacies, and Foreign Affairs" (1983) 12 *Philosophy and Public Affairs* 205, 206-32; Norton Moore "Beyond the Democratic Peace: Solving the War Puzzle" (2004) 44 *Virginia Journal of International Law* 341, John Owen *Liberal Peace, Liberal War: American Politics and International Security* (Cornell University Press, New York, 1997), Erich Weede "Some simple calculations on democracy and war involvement" (1992) 29(4) *Journal of Peace Research* at 377.

states over the past 200 years.³¹⁴ It was noted that democracies do not wage war against each other³¹⁵ and that democratisation addresses the exclusionary politics at the heart of civil conflicts by ensuring legitimacy stems from the interest of the governed.³¹⁶ Global events that resonate with state and institutional practices from the nineteenth century to date support this claims and are bolstered by former UN Secretary-General Kofi Annan's statement that democratisation gives people a stake in society and is indeed the key to lasting peace.³¹⁷

In contrast, the effective control doctrine is said to promote political instability, unconstitutional regime changes and human rights violations as a result of the violence that is often accompanied by the need to maintain control and efficacy under the doctrine.³¹⁸ As explained in Chapter four, recognition under the effective control doctrine mainly stems from effectiveness and level of control. Thus, a regime engaging in human rights violation by definition does not forfeit its entitlement to be recognised under the doctrine.³¹⁹ It may request external intervention as the ubiquity of armed conflicts permits provided it is in control. The general acceptance is that successful revolution or coup begets its legality.³²⁰ Consequently, a government

³¹⁴ Michael Doyle "Kant, liberal legacies, and foreign affairs" (1983) *Philosophy & Public Affairs* at 217, Kenneth Schultz "Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War" (1999) 53 *International Organizations* 233, Anne Slaughter "International Law in a World of Liberal States" (1995) 6 *European Journal of International Law* 503. This has been severely criticized. See for example, Brad Roth *Governmental illegitimacy in international law* (Oxford University Press, 2000) at 424

³¹⁵ Erich Weede "Some simple calculations on democracy and war involvement" (1992) 29(4) *Journal of Peace Research* at 377. Weede argues that "the apparent absence of war among the liberal states, whether adjacent or not, for almost two hundred years has some significance. Politically more significant, perhaps, is that when states are forced to decide, by the pressure of an impinging world war, on which side of a world contest they will fight, liberal states wind up all on the same side."

³¹⁶ Gregory Fox and Brad Roth, eds. *Democratic governance and international law* (Cambridge University Press, 2000) at 103.

³¹⁷ 1998 statement quoted in Mac Ginty ed. *Routledge handbook of peacebuilding* (Routledge, 2013) at 113.

³¹⁸ Brad Roth "Secessions, coups and the international rule of law: Assessing the decline of the effective control doctrine." (2010) *Melb. J. Int'l L.* 11 at 394.

³¹⁹ Brad Roth, *Governmental illegitimacy in International Law* (Oxford University Press, 1999), at 163.

³²⁰ Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans, Russell & Russell, 1961) 118. Kelsen elaborated as that "Under what circumstances does a national legal order begin or cease to be valid? The answer, given by international law, is that a national legal order begins to be valid as soon as it has become - on the whole - efficacious; and it ceases to be valid as soon as it loses its efficacy. The government brought into permanent power by a revolution or *coup d'etat* is, according to international law, the legitimate government of the State, whose identity is not affected by these events. Hence, according to international law, victorious revolutions or successful *coups d'etat* are to be interpreted as procedures by which a national legal order can be changed. Both events are, viewed in the light of international law, law-creating facts."

brought to power by a revolution or coup is regarded by international law as the legitimate government of the state "as soon as it has become on the whole efficacious, and it ceases to be valid as soon as it loses that efficacy"³²¹ thus, it is irrelevant whether the regime change is constitutional or whether it expresses the interest or will of the governed. As noted by Justice Taft in *Tinoco Concession Case* is that:³²²

Legitimacy is not about a new government assuming power or conducting its administration under constitutional limitation established by its people during the incumbency of the government it has overthrown. The question is, has it established itself in such a way that all within its influence recognise its control and that there is no opposing force assuming to be a government in its place.

Indeed, moral ambiguity, political instability and unconstitutionality surround the effective control rule seeming because it favours effectiveness and control.

5.2.2.2. Consolidation by State

The second identified differences between the effective control doctrine and democratic legitimacy is consolidation. The effective control doctrine has been in existence since the sixteenth century and has been the only substantial landmark recognition approach that best determines whom to recognise during armed conflict.³²³ Yet, it has never been consolidated by the United Nations, states or regional organisations. In contrast, democratic legitimacy is being consolidated by some states. In 1988, the United Nations organised the first International Conference on New and Restored Democracies in Manila, with 13 countries in full attendance for the consolidation of democracy.³²⁴

By 1989, more than sixty states, equivalents to nearly one-third of the UN organisation members were in attendance and support of democratisation.³²⁵ Also,

³²¹ Hans Kelsen, *General Theory of Law and State* (Harvard University Press, Wedberg trans., 1961), at 220-1.

³²² Trevor Redmond "Power to the People-Intervention to Restore Democracy" (2004) 12 ISLR at 5.

³²³ Awol Kassim Allo "Counter-intervention, Invitation, Both or Neither: An Appraisal of the 2006 Ethiopian Intervention in Somalia" (2009) 3 *Mizan Law Review* at 220.

³²⁴ UN GA Doc/A/Res/A/50/133 and Corr.1 20 December 1995.

³²⁵ Apart from this, in 1994, the number of states that attended the restored democracy summit in Managua increased to 75, thereby indicating states' interest in democratic processes. Following the summit, the United Nations General Assembly through resolution A/RES/49/30 requested the Secretary-General of the United Nations, Boutros-Ghali, to study and give comprehensive reports on the methods and mechanisms that the United Nations could use in the consolidation and promotion of democracy. On the 7th of August 1995, the UN Secretary-General submitted his report titled 'Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or

In 1994, the numbers of states that attended the restored democracy summit in Managua increased to seventy-five, thereby indicating states interest in democratic processes. Following the summit, the United Nations General Assembly by resolution A/RES/49/30 requested the Secretary-General of the United Nations, Boutros-Ghali³²⁶ to study and give comprehensive reports on the methods and mechanisms the United Nations can use in the consolidation and promotion of democracy.³²⁷ A second report of the Secretary-General showed evidence of states' interest in the democratisation of the United Nations itself which was addressed at the fiftieth anniversary of the United Nations with representatives of one hundred and twenty-eight states in attendances.³²⁸ The increase in numbers indicates the rapid spread and acceptance of democracy. International conferences on human rights such as the "United Nations World Conference on Human Rights" where self-determination was affirmed as an element of democracy assert these facts.³²⁹

Restored Democracies.' n the report, the Secretary-General made references to indissoluble links between human rights, democracy and development, which he believed to be interchangeable and interdependent. Furthermore, he asserted that democracy is an expression of the free will of the people to determine their own political, economic, social and cultural system inclusive of their participation in all aspects of their lives. Justifying the advantage of a democratic legitimacy, the UN Secretary-General stated: Because democratic Governments are freely chosen by their citizens and held accountable through periodic and genuine elections and other mechanisms, they are . . . less likely to abuse their power against the peoples of their own State territories. Democracy within States thus fosters the evolution of the social contract upon which lasting peace can be built." By contrast, "Lacking the legitimacy or real support offered by free elections, authoritarian Governments all too often have recourse to intimidation and violence in order to suppress internal dissent." A second report of the UN Secretary-General showed evidence of states' interest in the democratisation of the United Nations itself. This was addressed at the 50th anniversary of the United Nations with representatives of 128 states in attendance. The increase in the number of states indicates the rapid spread and acceptance of democracy within the United Nation. International conferences on human rights, such as the 'United Nations World Conference on Human Rights', where self-determination was affirmed as an element of democracy, assert these facts.³²⁵ Statistical shifts in states' policies, commitments and paradigm towards democratic legitimacy further affirm that democracy was settled within the United Nations. Michael Byers and Simon Chesterman observed that "the number of states legally committed to open multi-party, secret-ballot elections with universal franchise grew from one-third in the mid-1980's to as many as two-thirds in 1991. With the collapse of authoritarian governments and the failing of socialist regimes, democratic legitimacy experienced an increase, clearly indicating governments' acceptance of the principle as the most objective approach for the recognition of government. As noted in the Budapest Declaration there exists an almost universal recognition that a democratic system of government is the best model to ensure a framework of liberties for lasting solutions to the political, economic and social problems societies faces.

³²⁶ The Sixth Secretary General of the United Nations from January 1992 to December 1996.

³²⁷ UN GA Doc/A/Res/49/30 22 December 1994.

³²⁸ Boutros Boutros-Ghali *An Agenda for Democratization* (United Nations, New York, 1996) at 6.

³²⁹ United Nations World Conference on Human Rights: Vienna Declaration and Program of Action, 32 I.L.M. 1661, 1665 (1993) [hereinafter Vienna Declaration]. The World Conference on Human Rights

Statistical shifts in states policies, commitments and paradigm towards democratic legitimacy further affirmed that democracy was settled and consolidated among states.³³⁰ Michael Byers and Simon Chesterman observed that “the number of states legally committed to open multi-party, secret-ballot elections with universal franchise grew from one-third in the mid-1980 to as many as two-thirds in 1991.”³³¹ With the collapse of authoritarian governments and failing of socialist regimes in the twentieth century, especially during the Arab Spring known as the fourth wave of democracy,³³² democratic legitimacy experienced a high increase clearly indicating a surge in its consolidation.

5.2.2.3. Self-determination Promotion

The third difference between the two approaches is respect for self-determination. Self-determination is said to be the oldest driving force of democracy and is one of the most important elements of international human rights that originated as far back as 1000BC.³³³ During the Versailles peace settlement, self-determination was a touchstone for universal entitlement and peace.³³⁴ Self-determination is internationally recognised as a symbol of political freedom.³³⁵ It is a prerequisite for the attainment of individual rights, which are often referred to as subjective rights.³³⁶

was assembled in Vienna by the United Nations on June 14-25, 1993. Representatives of 171 states attended. The Vienna Declaration was adopted by acclamation on June 25, 1993. Id. at 1661.

³³⁰ US department of states Country reports on human rights practice for 1990 mentioned 110 democratic states see Michael Byers and Simon Chesterman “You, the People : Pro-Democratic Intervention in International Law” 2000 Democratic Governance and International Law at 259.

³³¹ Michael Byers and Simon Chesterman “You, the People: Pro-Democratic Intervention in International Law” (2000) Democratic Governance and International Law 259-92.

³³² Michael McFaul “The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in The Post-Communist World” (2002) 54.2 *World Politics* at 212-244. Also, Cristian Popescu “Is there a fourth wave of democracy or not? An evaluation of the latest theories.” *The USV Annals of Economics and Public Administration* 12.1 (15) (2013): 32-38.

³³³ Thomas Franck “The emerging right to democratic governance.” (1992) 86 *American Journal of International Law* at 52.

³³⁴ Hurst Hannum *Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, 2011) at 20-31, Thomas M Franck “Legitimacy in the International System” 1988 82(4) *The American Journal of International Law* at 743-748.

³³⁵ Kristina Roepstorff *The Politics of Self-determination: Beyond the Decolonisation Process* (Routledge, 2012) at 26.

³³⁶ Dominic McGoldrick *The Human Rights Committee: Its role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press, USA, 1991) at 14.

As such, denial of the right to self-determination may signify the loss of rights such as freedom of expression, political participation and equality.³³⁷

Self-determination as a right allows people to pursue their socio-political and economic lives, as well as choose their form of government without interference.³³⁸ As such, governments that are unconstitutional in origin because of a coup or lack popular supports infringe on their citizen's internal self-determination.³³⁹ In most cases, these types of governments are faced with non-recognition and regime changes. An example is Haiti (1992), Libya (2011) and Gambia (2017). Self-determination is interrelated with democracy and is classified as a right in human rights instruments such as the UDHR and ICCPR; it works hand-in-hand with democratic legitimacy which relies on democracy.³⁴⁰ In contrast, the effective control is antithetical to the notion of self-determination because it overtly relies on the notion of "Might make right " as opposed to "Right make Might".³⁴¹

Conclusively from this section, it can be adduced that the effective control doctrine is antithetical to the notion of self-determination of the people, non-consolidated by states, and antithetical to the promotion of regime constitutionality compared to democratic legitimacy. In answering part of the research question, from the provide evidence, the effective control doctrine therefore ceases to be a more suitable solution to the recognition of governments problems than democratic legitimacy. As such, it won't warrant further investigation in this Chapter for the following reasons. Firstly, despite the similarities, the result from the disparity between both approaches espouse democratic legitimacy as a better and more suitable solution than the effective control doctrine. Also, some of the identified

³³⁷ Jordan J Paust "International Law, Dignity, Democracy, and the Arab Spring" 2013 46 Cornell Int'l LJ at 5

³³⁸ Christine Griffioen "Self-Determination as a Human Right: The Emergency Exit of Remedial Secession" (2010) Economic Public Law at 15.

³³⁹ Steven Wheatley *The Democratic Legitimacy of International Law* (Hart Pub, Oxford, 2010) at 229.

³⁴⁰ The government of West Germany argued in 1988 that "the exercise of the right to self-determination required the democratic process." GAOR, A/C.3/43/SR.7, 13 October 1988, at 16 at para 76. The government of India argued in 1996: "The internal aspects of self-determination includes the right of people to choose their own form of government and the right to democracy and they do not and cannot include the right of a fraction of the people to secede." CCPR/C/76/Add.6, 17 July 1995, at para 32.

³⁴¹ Brad Roth "Secessions, coups and the international rule of law: Assessing the decline of the effective control doctrine." (2010) *Melb. J. Int'l L.* 11 at 394.

disparities are part of the debate pushing for the replacement of the effective control doctrine in the first place. In addition, the aim of this Chapter was to identify the best of the two approach which has now been achieved.

Secondly, in Chapter four of this study, the author discussed Carlos Tobar claims that unconstitutionality obstructs peace and political stability. The author's concluded that despite the disadvantages of Tobar's Doctrine, having a recognition of government approach that promotes constitutionalism protects sovereignty, deters ambitious revolutions and regime changes are much desirable. The author position has not changed in this respect, having considered the disadvantages and impact of having an effective control approach for the recognition of governments with regards to the ongoing South Sudan and Libya conflicts.

Thirdly, the US Secretary of State Thomas Jefferson identifies the importance of self-determination of the people.³⁴² A review of Jefferson's approach to recognition of governments demonstrates that an approach based on the self-determination of the people resolves the debates on the confusion that arises as a result of variances in state practices by shifting focus to citizens will. In addition, Jefferson's approach demonstrates that having recognition of government approach that promotes self-determination of the people secures inalienable rights and importantly, constitutional accountability of government.

Fourthly, when a rule is consolidated, it ensures compliance which indeed is the measure of a principle legitimacy and acceptances. Further, it ensures the sustainability of a practice. As noted in Chapter Four, the consolidation of Carlos Tobar doctrine among the Central American states and its enshrinement in the Treaty of Peace and Amity of 1907 secured its sustainability for twenty-three years. Considering the aim of this study is seek a solution with fewer encumbrances to the recognition of government controversies, the author maintains democratic legitimacy as a better suitable solution to the recognition of governments problems than the effective control doctrine. As a result, this study will now focus on democratic legitimacy.

³⁴² Thomas Jefferson served as the US first Secretary of States from 22 March 1790 to 31 December 1793.

5.3. Comparative Analysis Discussion

5.3.1. Democratic Legitimacy as a Solution and Sustainable Practice: The Demerits

The investigation into the similarities and differences between the effective control doctrine and democratic legitimacy helped identify democratic legitimacy as a more suitable approach than the current effective control doctrine. Six identified variables in the comparative analysis in the previous section between democratic legitimacy and the effective control doctrine helped this conclusion.

In this section, the author will conduct an in-depth examination of the variables. By variables, the author refers to the quality that makes democratic legitimacy distinct. In so doing, the author is able to lay foundation for further discussion in the next section as well as answer the second part of the research question, i.e. whether democratic legitimacy would be a sustainable replacement of the effective control doctrine or whether an alternative solution needs to be derived for the recognition of governments in international law?

Secondly, in relation to connection with established international law norm, both democracy and human rights evolved in tandem and pursued the common goal of combatting oppression. This claim is evidenced-based considering the United Nations Secretary-General's Report titled "Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies."³⁴³ In the report, the UN Secretary-General Boutros Boutros-Ghali³⁴⁴ referred to the indissoluble links between human rights and democracy which he claims to be interchangeable and interdependent.³⁴⁵ This is not to say that all recognised governments that came into power on the basis of democracy observe human rights. Neither does this study refute Tony Evans' observation that we must treat the claim that human rights and democracy share a symbiotic relationship with

³⁴³ UN GA Doc/A/Res/A/50/133and Corr.1 20 December 1995.

³⁴⁴ Secretary-General of the United Nations (1992–1996)

³⁴⁵ UNGA Doc/A/Res/A/50/133and Corr.1 20 December 1995. Justifying the relationship, the UN Secretary-General democratic Governments are freely chosen by their citizens and held accountable through periodic and genuine elections and other mechanisms, they are less likely to abuse their power against the peoples of their own State territories. Democracy within States thus fosters the evolution of the social contract upon which lasting peace can be built. Lacking the legitimacy or real support offered by free elections, authoritarian Governments all too often have recourse to intimidation and violence in order to suppress internal dissent.

great caution.³⁴⁶ Given that human rights abuses in democratic states are not hard to be identified. However, because freedom of expression³⁴⁷, self-determination, and political participation are defining elements of democracy with which human rights flourishes, democratic legitimacy continues to work in tandem with human rights and remains distinguish compared to the effective control doctrine that lacks consideration for human rights.

Thirdly, with regards to the promotion of constitutionality and evidence of state practice, the past few decades in international law have witnessed more international engagement of states in the promotion of constitutionality through pro-democratic intervention than ever before.³⁴⁸ On different occasions before, during and after the Arab Spring, the international community vigorously defended democracy. This was done not only through pro-democratic interventions, but the recognition of opposition against some authoritarian governments or coup plotters. In 1996, the UN, ECOWAS, OAU, EU and Commonwealth not only condemned the coup by the Armed Revolutionary Council (AFRC) against the elected President of Sierra Leone, Ahmad Tejan Kabbah³⁴⁹ but ensured the unconditional restoration of his candidacy.³⁵⁰ In Libya (2011), the international community endorsed the use of external force to promote democracy and human rights against the authoritarian government of President Mohammed Qaddafi. States later went ahead to recognise the government's opposition. In Gambia (2017), the African Union endorsed and recognised the newly elected government of President Adama Barrow against long-term president Yahya Jammeh, who refused to accept the results of the december 2016 democratic elections.³⁵¹

³⁴⁶ Tony Evans "If democracy, then human rights? (2001) 22 *Third world quarterly* at 623-642.

³⁴⁷ Today, freedom of expression is enshrined in some states constitutions as a fundamental human right and it is regarded as an essential determinant of democracy.

³⁴⁸ Gregory Fox and Brad Roth, eds. *Democratic governance and international law* (Cambridge University Press, 2000) at 329.

³⁴⁹ It should be noted that Ahmad Tejan Kabbah served twice as the 3rd President of Sierra Leone, from 1996 to 1997 and again from 1998 to 2007. However, the discuss situation refers to his first reign as the president in 1996.

³⁵⁰ Gregory Fox and Brad Roth, eds. *Democratic governance and international law* (Cambridge University Press, 2000) at 305 to 307.

³⁵¹ This was also demonstrated in the failed August coup against the Soviet Union in August 1991, the year of the Haiti coup. This coup, also known as the *August Putsch*, was plotted by the Communist Party of the Soviet Union (CPSU) to oust the president of the Soviet Union, Mikhail Gorbachev. However, it was defeated after just three days as a result of the efforts of Russian president, Boris

Fourthly, democratic legitimacy is enshrined in international instruments and soft law. The most apparent evidence of this relationship is found in human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,³⁵² the American Convention on Human Rights,³⁵³ and the African Charter on Human and People's Rights.³⁵⁴ All of these assert that human rights are best protected by a democratically formed government.³⁵⁵ For instance, Article 1(1) of the ICCPR, which reflects Article 1 of the ICESCR states, that, "all people have the right to self-determination. By that right, they unreservedly determine their political status and freely pursue their economic, social and cultural development."³⁵⁶ Also, Article 20(1) of the African Charter on Human and People's Rights (the Banjul Charter) affirms the peoples' indisputable and inalienable right to internal self-determination.³⁵⁷ Democratic legitimacy components can also be found in soft laws such as the Declaration on the Granting of Independence to Colonial Countries and Peoples³⁵⁸, Declaration of Principles of Friendly Relations,³⁵⁹ Declaration of the Rights of Indigenous Peoples,³⁶⁰ the Helsinki Final Act (1975) and the 1990 Paris Charter. It is also enshrined in the UN Commission on Human Rights Resolution on Promotion of the Right to Democracy,³⁶¹ and Larger Freedom: Towards Development, Security and Human Rights for All.³⁶²

Yeltsin, citizens of the Soviet Union, and state leaders who came out in defence of democracy. Thomas Franck describes the tremendous support for the incumbent regime and the actions of state and non-state actors as pointing to the "inestimable human, political and historical import that demonstrates for those sensitive to trends that democracy is beginning to be seen as the *sine qua non*³⁵¹ for validating governance." Another example of the value placed on democracy is the failed Peru palace coup (1992), where President Alberto Fujimori, in conjunction with the state military, announced a self-coup called 'Plan, Verde' for the sole purpose of limiting democracy in the country. The restoration of democracy in Guatemala after the suspension of constitutional rule by the dictatorship headed by President Serrano

³⁵² Nov. 4, 1950, 312 U.N.T.S. 221

³⁵³ Nov. 22, 1969, 1144 U.N.T.S. 123.

³⁵⁴ June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, 58 (1982).

³⁵⁵ Andrew Moravcsik "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" 2000 54(2) International Organization at 295

³⁵⁶ Article 1(1) of the ICCPR AND ICESCR.

³⁵⁷ Article 20(1) the African Charter on Human and People's Rights (Banjul Charter).

³⁵⁸ UN GA Res.1514 (XV) 1960.

³⁵⁹ UN GA Res.2625 (XXV) 1970.

³⁶⁰ UN GA Res.61/295 2007.

³⁶¹ Communique on Human Rights, Promotion of the Right to Democracy, UN Doc. E/CN.4/RES/1999/57 (Apr. 27, 1999).

³⁶² Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc. A/59/2005 (Mar. 21,

Fifthly, democratic legitimacy allows people to pursue their socio-political and economic lives, as well as choose their form of government without interference.³⁶³ As such, governments that are unconstitutional in origin because of a coup, lack popular support or fail to respect citizens' self-determination not only infringe on their right to internal self-determination but violate international law principles.³⁶⁴ In most cases, these types of governments are faced with non-recognition and regime changes because the current disposition of states has low tolerance toward governments that fails to consider and respect their citizens' right to self-determination. This is evident in the UN Security Council's interventions in securing the self-determination rights of citizens in states such as East Timor, Nicaragua, Haiti, and, recently, Tunisia.³⁶⁵

Sixthly, in the last ten years, democratic legitimacy has been a conditionality for state relations. Commonwealth suspension of aids programme to unconstitutional regimes, the European Union suspension of activity with undemocratic government based on Article 11(1) of the 1992 EU treaty and the 20-year Cotonou Agreement between the African, Caribbean, Pacific states and the European Union demonstrate this evidence. For instance, after 1999 military Coup in Cote d'Ivoire, the European Union launched a bilateral discussion with the state on breach of Article 5 of Lomé V and the need for restoration of democracy or suspension of aids.³⁶⁶ Likewise in response to Coup d'état and human rights violation in Fiji (2000 and 2007), Zimbabwe (2002), the Central African Republic (2003), Togo (2004), Madagascar (2010), (Guinea-Bissau (2004 and 2011) and Burundi (2015) the EU invoked Article 96 Cotonou Agreement as sanctions that include suspension of aids and cooperation programme.

2005).

³⁶³ UN Doc. CCPR/C/TTO/99/3 Paragraph 20-1.

³⁶⁴ Steven Wheatley *The Democratic Legitimacy of International Law* (Hart Pub, Oxford, 2010) at 229.

³⁶⁵ Marc Weller "Settling Self-determination Conflicts: Recent Developments" 2009 20(1) European Journal of International Law 111 at 111-65. There are currently more than 20 on-going armed conflicts related to the abuse of self-determination. While some stem from the violation of human rights, others represent protests against undemocratic governance. Self-determination enables citizens to collectively and individually resist the violation of this right, as witnessed in Kurdish, Quebecois, Basques, Nigerian Igbo and Palestinians' revolts.

³⁶⁶ Rich Roland "Bringing democracy into international law" (2001) 12 *Journal of Democracy* at 29-30.

Finally, democratic legitimacy, unlike other recognition of government approaches is being consolidated and carries with it a moralistic obligation which can easily be conceptualised in different ways. For instance, some academics espoused a human rights-based obligatory conceptualisation by the defence of a right to political participation, democratic governance and a right to free and fair elections.³⁶⁷ Others contend democratic legitimacy through the lens of internal self-determination originating from the existence of a customary international obligation to be democratic.³⁶⁸ Whichever way it is viewed, indeed it is quite evident that a customary obligation to promote democratic origin of government exists in international law.³⁶⁹ Although, the obligation is argued as an *erga omnes* obligation rather than a *Jus Cogen* obligation.³⁷⁰ It undeniably exists and can easily be adduced globally in state practices, including the African continents where democratic governments have been challenged. An example of state practices relating to this obligation is demonstrated in Gambia (2017). President Yahya Jammeh, who had been in power for 22 years as the president of Gambia, shockingly lost his state democratic election to the presidential candidate of Coalition 2016, Adama Barrow.³⁷¹ Upon realisation of the implication of his defeat, President Jammeh declared a 90-day state of emergency, citing election irregularities with the presidential released result.³⁷² In an obligatory move to uphold democracy in Gambia, the Security Council of the African Union (AU) in its 647th communique declared that Jammeh ceases to be recognised as the legitimate president of Gambia from the 19th January 2017.³⁷³

³⁶⁷ Jean Aspermont "The rise and fall of democracy governance in international law: A reply to Susan Marks" (2011) 22 *European Journal of International Law* at 556

³⁶⁸ Thomas Christiano "Self Determination and the Human Right to Democracy" (2015) *Philosophical Foundations of Human Rights* at 459-480.

³⁶⁹ Jean Aspermont "The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks" (2011) 22 *European Journal of International Law* at 556. See also Jure Vidmar "The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?" (2010) 10 *Human Rts L Rev* at 239.

³⁷⁰ Jean Aspermont "The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks" (2011) 22 *European Journal of International Law* at 557.

³⁷¹ Vines A "Gambia's Election Result Is A Sign Of Democracy Advancing In Africa" <<http://www.newsweek.com/gambia-election-result-sign-democracy-advancing-africa-528532>: NewsWeek> Accessed 8 April 2017.

³⁷² The Gambia's Yahya Jammeh's term extended by parliament CNN <<https://www.bbc.com/news/world-africa-38662000>> accessed on the 18 January 2018.

³⁷³ Vines A "Gambia's Election Result Is A Sign Of Democracy Advancing In Africa" <<http://www.newsweek.com/gambia-election-result-sign-democracy-advancing-africa-528532>: NewsWeek> Accessed 13 April 2017.

More importantly, it stressed the AU's determination "to take all necessary measures, in line with the relevant AU Instruments" to ensure full compliance with the outcome of the presidential elections. Similarly, the Economic Community of West African States (ECOWAS) issued an ultimatum to President Yahya Jammeh to step down and vacate office by midnight 19 January 2017 or be ousted from office.³⁷⁴ In its published communique, "ECOWAS expressly agreed to uphold the result of the Gambian elections; request the endorsement of the AU and the UN on the matter and take all necessary measures to enforce the results of the 1st December 2016 elections." The declarations made by the AU and ECOWAS followed Jammeh's failure to concede power after a promise of a peaceful transition to democratic elected President Adama Barrow. On the 19th January 2017, Barrow was sworn into office while in exile at the Gambia Embassy in Dakar based on the United Nations Security Council Resolution 2337 (2017). Three days later, ECOWAS troops arrived in Gambia and seized the state capital. This marked the end of Yahya Jammeh's authoritarian reign as he flew on exile to Equatorial Guinea and the promotion of democratic rule in Gambia.³⁷⁵

5.3.2. Democratic Legitimacy as a Solution and Sustainable Practice: The Demerits

Having discussed the features of democratic legitimacy that makes it a more suitable approach than the current effective control doctrine, the aim of this section is to discuss the disadvantages of democratic legitimacy as a solution.

As earlier stated, Haiti was selected as a case study because it is the first state where the effective control rule was collectively abandoned by the majority of the American states granting recognition. In the international realm, it was the first south America state where collective roles were jointly played by both state and non-state actors in the restoration of democracy. Till today, Haiti stands out as a reference for the end of an era in the traditional practices of the effective control doctrine and a tested study into the emergence and development of democratic legitimacy. Further,

³⁷⁴ Paul Obi and Alex Emunah, 'Gambia: Jammeh Gets Ecowas Deadline - Step Down Midnight Tomorrow or Face Forceful Ejection' *Thisday Newspaper*

<<https://allafrica.com/stories/201701170545.html>> accessed on 17 January 2017.

³⁷⁵ The Gambia's former leader Yahya Jammeh goes into exile in Equatorial Guinea amid rising tensions *The News* <<http://www.abc.net.au/news/2017-01-22/gambias-former-leader-jammeh-flies-into-exile/8201628>> accessed on the 2nd of February 2015 .

Libya was selected as a case study because Libya stands out as a state where states pre-maturely recognised oppositions. Also, it is the only tested state where oppositions were democratic and recently became repressive thereby questioning the usefulness of democratic legitimacy as an approach to the recognition of governments.

Also, there are obvious similarities and differences in Haiti and Libyan interventions to warrant their use as case study. A similarity is the collective intervention by both states and non-state actors occurred in both state conflicts. Also, Haiti regime change occurred during the third wave of democracy when usurpations in constitutional order as a result of coups were a considerable threat to international security and peace.³⁷⁶ In contrast, Libya regime change occurred during the fourth wave of democracy known as the Arab Spring when democratic revolutions were blessing for the restoration of popular will and the removal of autocratic, tyranny and unconstitutional regimes.³⁷⁷

Given the aim of this Chapter is to investigate whether democratic legitimacy can be a sustainable approach for the recognition of government, Libya and Haiti stand out as the central cases to consider.

5.3.3. Case Study: Haiti (1991)

Haiti, the first Black republic in the world and the poorest country in the western hemisphere,³⁷⁸ elected its first democratic president by a two-thirds majority of votes under the close watch of the United Nations (UN) election monitoring committee on 16th December 1990.³⁷⁹ The election brought political hope to Haitians, who had been oppressed by the autocratic regime of former President Jean-Claude Duvalier. However, seven months after the election, these hopes were dashed.³⁸⁰ The Front for the Advancement of Progress of Haiti (FRAPH), comprising Haitian military, police and security forces enforced unconstitutional regime change through a coup d'état³⁸¹ that

³⁷⁶ Samuel Huntington "Democracy's third wave" (1991) 2 *Journal of democracy* at 12-34.

³⁷⁷ Ibrahim Abushouk "The Arab Spring: a fourth wave of democratization?" (2016) 25 *Digest of Middle East Studies* at 52-69. Olimat Muhamad "The fourth wave: Revolution and democratization in the Arab Middle East." (2011) 12 *Journal of International Women's Studies* at 1-6.

³⁷⁸ Audrey M Wade "A Dream Deferred: The United States-Haitian Interdiction Policy" (1993) 2 *How. Scroll: Soc. Just. Rev.* at 55.

³⁷⁹ At 55.

³⁸⁰ President Jean-Bertrand Aristide was on a state visit to the UN headquarters in New York.

³⁸¹ Also referred to as Front Revolutionnaires pour l'Avancement et le Progress en Haiti.

overthrew the democratic government of President Jean-Bertrand Aristide and established the FRAPH as a military government headed by Joseph Raoul Cedars.³⁸²

From the standpoint of Haiti's long entrenched but suddenly vulnerable elites, the coup brought salvation from an ochlocracy that failed to respect the rule of law and human rights. On the other hand, from the standpoint of Haiti's long-disenfranchised poor majority, the coup was a reactionary and bloody usurpation of popular will.³⁸³ Aristide's constitutional and extra-constitutional reforms mainly targeted military and para-military personnel who had committed human rights atrocities during the reign of his predecessor, Jean-Claude Duvalier.³⁸⁴ This resulted in the formation of opposition groups within and outside of his government, particularly among some elites who had strongly opposed his presidency.³⁸⁵

In maintaining effective control of Haiti, the FRAPH committed gross human rights atrocities that led to a massive exit of citizens to the United States and other neighbouring states.³⁸⁶ Haiti became unsafe for Aristide's supporters, including Aristide himself, who went into political exile in Venezuela. In response to the unconstitutional regime change, the UN, the Organisation of American States (OAS) and other regional organisations denounced the coup d'état and issued a repudiation condemning persistent human rights violations in the country.³⁸⁷ They demanded the return of the democratic government of Aristide and remained steadfast in their recognition of his government as the sole democratic representative of Haitians.³⁸⁸

States neither recognised the FRAPH government nor engaged in diplomatic relations with its representatives. Instead, recognition was accorded to the exiled

³⁸² Cécile Vandewoude "The Democratic Entitlement and Pro-Democratic Interventions: Twenty Years After Haiti?" (2012) 12 *Mexican Yearbook of International Law* at 779.

³⁸³ Brad Roth *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 2000) at 367.

³⁸⁴ At 367

³⁸⁵ Above n 385 at 367.

³⁸⁶ A Comprehensive Report on Human Rights Violations around the World *Amnesty International Report* 1992 (1991) see also Country Reports on Human Rights Practices for 1991, Report Submitted to the Committee on Foreign Affairs House of Representatives and the Committee of Foreign Relations U. S. Senate, (1992)103d Cong., 2d Sees. 633.

³⁸⁷ Brad Roth *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 2000) at 367.

³⁸⁸ At 367.

government of Aristide.³⁸⁹ While in exile, Aristide vehemently denounced the coup government and pushed for his return, arguing that the coup d'état should not be permitted to deter democracy.³⁹⁰

Acting under Chapter VII of its mandate, the UN Security Council adopted Resolution 940 that ordered the use of economic sanctions and all necessary means to oust the unconstitutional government of the FRAPH.³⁹¹ It also ordered the restoration of Aristide's government as the only recognised and legitimate democratic representative of Haiti.³⁹² Alongside the UN Forces, in a collective military intervention termed 'Operation Uphold Democracy', the United States reinstated Aristide as the lawful representative of Haiti.³⁹³ In total, 15 resolutions were issued by the Security Council in response to the Haiti coup.³⁹⁴ The first, which relied on Article 41 of the UN Charter, provided that, if a solution was not found within seven days the Security Council would ban all international relations and trade with the FRAPH, including the supply of military equipment.³⁹⁵ Paragraph 16 expressed the Security Council's readiness to review these measures if, in good faith, the FRAPH agreed to reinstate Aristide.³⁹⁶

The 14 remaining resolutions and general statements issued by the Security Council focused on the mandatory restoration of democracy in Haiti by means of the reinstatement of Aristide and the full respect for human rights.³⁹⁷ As observed by

³⁸⁹ Edward Collins Jr and Timothy M Cole "Regime Legitimation in Instances of Coup-Caused Governments-in-Exile: The Cases of Presidents Makarios and Aristide" 1996 5 J. Int'l L. & Prac. at 199-200.

³⁹⁰ Paul Lewis, U.N. Stops Short of Haiti Resolution *New York Times* <<http://www.nytimes.com/1991/10/04/world/un-stops-short-of-haiti-resolution.html>> accessed on the 03 Oct 2014.

³⁹¹ UN SC/Res/940 31 July 1994.

³⁹² Brad Roth *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 2000) at 367. President Bill Clinton "Address to the Nation on Haiti" 1994 30 *Weekly Compilation of Presidential Documents* at 1779.

³⁹³ Edward Collins Jr and Timothy M Cole "Regime Legitimation in Instances of Coup-Caused Governments-in-Exile: The Cases of Presidents Makarios and Aristide" 1996 5 J. Int'l L. & Prac. at 200.

³⁹⁴ See, Haiti: Resolution of the UN Security Council and Statements by its President 14 Nov. 2014 <<http://www.hartford-hwp.com/archives/43a/132.html#Z9>>

³⁹⁵ UN SC Res 841 (1993) 16 June 1993.

³⁹⁶ The OAS request centred on intervention to promote democracy based on the Santiago Convention.

³⁹⁶ UN embargo on Haiti, The Independent resources on global Security: Resolution of the UN Security Council and Statements by its President *Stockholm International Peace Research Institute* Haiti 15 Nov. 2014.

³⁹⁷ The FRAPH's non-compliance with the demand to restore Aristide as the president of Haiti resulted in Security Council Resolution 940 (1994) ordering the use of all forms of necessary force for the

Elizabeth Gibbons, "this unique resolution set a precedent for the collective enforcement of the democratic entitlement".³⁹⁸ The reason being that the Security Council and other regional organisations' reaction to coup regimes had always been sanctioned that take the form diplomatic relations termination, rather than, the restoration of democracy.³⁹⁹ The only logical explanation for the Security Council's response to the Haiti coup by the restored of democracy was the consolidation of democratic legitimacy by the Organisation of America States.

Four months before the Haiti coup, on 5th June 1991, 34 democratically elected representatives of Latin American states met in Santiago, Chile under the aegis of the OAS for an extraordinary meeting of the General Assembly.⁴⁰⁰ The purpose of the meeting was to sign a document termed the Santiago Commitment to Democracy and The Renewal of the Inter-American System. It consisted of various agreements affirming democracy as a state priority and the only statutory instrument for the manifestation of the people's will.⁴⁰¹ The mandate of the Santiago document, as enshrined in resolution 1080 of the agreement, was: ⁴⁰²

To instruct the Secretary-General on the immediate convocation of a meeting of the Permanent Council in the events of any occurrences giving rise to the sudden or irregular interruption of the democratic political, institutional process of the legitimate exercise of power by the democratically elected government in any organisation's member states. Within the framework of the charter, to examine the situation, decide on and convene an ad-hoc meeting of the ministers of foreign affairs or a special session of the General Assembly, all of which must take place within a ten-day period.

removal of the *de facto* regime of the FRAPH and the restoration of Aristide. The wording of the resolution shows that the Chapter VII mandate the Security Council relied upon was solely for the restoration of democracy. The Security Council's resolutions did not demonstrate that the human rights violations in Haiti were a threat to international peace and security and that the coup was so overwhelming that it was left with no other choice but to interfere in the country's domestic affairs. The Council's intervention in Haiti was thus unjustified. The application of Article 2(7) and Chapter VII of the UN Charter would have been justifiable on the grounds of protecting Haitian lives, property and human rights.

³⁹⁸ Elizabeth D Gibbons *Sanctions in Haiti: Human rights and democracy under assault* (Greenwood Publishing Group, 1999) at 7.

³⁹⁹ The basis for the Security Council's authorisation and states' response that led to unambiguous repudiation of the legality of the *de facto* regime of the FRAPH was not clear at the time of the Haiti coup. While states and international organisations did not support the bloody violence and continuous violation of human rights perpetrated by the FRAPH, this could not have been a legitimate reason for not recognising it as the origins of a regime, whether democratic or not, are irrelevant to its legitimacy.

⁴⁰⁰ Roland I Perusse *Haitian Democracy Restored, 1991-1995* (University Press of America, 1995) at 21.

⁴⁰¹ Gregory Fox and Brad Roth *Democratic Governance and International Law* (Cambridge University Press, 2000) at 374.

⁴⁰² AG/Res.1080 (XXI-0/91) (5TH Plenary Session, June 5, 1991). Emphasis added.

In line with the Santiago agreement, three days after the Haiti coup, the OAS Council met and invoked resolution 1080 of the document and resolution CP/RES.567 (870/91), denouncing the Haiti coup and demanding strict adherence to the Haiti Constitution, as well as respect for the democratically elected administration of Aristide.⁴⁰³ Importantly, the resolution reads, “to adopt, in accordance with the OAS Charter and international law, any additional measures that may be necessary and appropriate to ensure the immediate reinstatement of President Jean-Bertrand Aristide to the exercise of his legitimate authority.”⁴⁰⁴

The fact that it denies any recognition of the FRAPH and demands the reinstatement of Aristide is evidence of democracy consolidation by states.⁴⁰⁵ Another example of the value placed on democracy is the failed Peru palace coup (1992), where President Alberto Fujimori, in conjunction with the state military, announced a self-coup called ‘Plan, Verde’ for the sole purpose of limiting democracy in the country.⁴⁰⁶ The restoration of democracy in Guatemala after the suspension of constitutional rule by the dictatorship headed by President Serrano also affirms the consolidation of democracy.⁴⁰⁷ This was confirmed by Luigi Einaudi, US Permanent Representative to the OAS, who stated that:⁴⁰⁸

A great principle is spreading across the world like wildfire. That principle, as we all know, is the revolutionary idea that the people, not governments, are sovereign. Democracy

⁴⁰³ It resolved to recognise the representative of the Government of President Jean- Bertrand Aristide as the only legitimate representative of the Government of Haiti. To recommend, with due respect to the policy of each member state on the recognition of states and governments, action to bring about the diplomatic isolation of those who hold power illegally in Haiti. To recommend to all states that they suspend their economic, financial, and commercial ties with Haiti and any aid and technical cooperation except that provided for strictly humanitarian purposes.

⁴⁰⁴ AG/Res.1080 (XX1-0/91) (5TH Plenary Session, June 5, 1991)

⁴⁰⁵ Thomas M Franck "The Emerging Right to Democratic Governance" (1992) 86 *The American Journal of International Law* at 46-91. It was clear that fundamental changes were occurring in the global system in relation to validating governments. This is evident in the history of recognition of governments in international law and states' responses to unconstitutional regimes.

⁴⁰⁶ A self-coup, otherwise known as auto-coup, is a form of coup d'état where a legitimate state representative incapacitates citizens, and other arms of government and unlawfully assumes extraordinary powers not granted under the constitution. Such powers include dissolving the constitution and the executive and judicial arms of government. See Seung-Ok Ryu "Effectiveness of Joint International Organization Operations in Latin America: Case Studies of Peru, Guatemala, and Haiti" (2011) *Seton Hall University Dissertations and Theses* at 18.

⁴⁰⁷ David Malone "Haiti and the International Community: A case study" 1997 39(2) *Survival* at 136.

⁴⁰⁸ Bureau of Pub. Aff., U.S. Dep't Of State, Current Pol'y No. 1240, Panama: A Just Cause 2 (1990) (Statement Of Luigi R. Einaudi, U.S. Permanent Representative To The Oas), quoted in David Wippman "Defending Democracy Through Foreign Intervention" (1996) 19 *Hous. J. Int'l L.* at 659.

today is synonymous with legitimacy the world over; it is, in short, the universal value of our time.

5.3.4. Case Study: Libya (2011 to 2019)

The Arab Spring started with pro-democratic protests that spread from Tunisia in 2010 to some states in North Africa and the Middle East.⁴⁰⁹ The protests led to the overthrow of established, elected, and unelected governments in Tunisia, Egypt, Libya, Syria⁴¹⁰ and Morocco.⁴¹¹ While they could be termed symbolic as they echoed the American Revolution and its Declaration of Independence, unsuccessful attempts to suppress these protests by some North African and Arab leaders drew the world's attention.⁴¹² Indeed, these events sent clear signals around the world that for the first time in the 21st century, pro-democratic regime change was occurring to a significant extent in some North African and Arab states.

Tunisian vegetable salesperson, Muammar Bouazizi's death, after he set himself ablaze to protest against government oppression, led to widespread protests across the country and resulted in the ousting of President Zine al-Abidine Ben Ali.⁴¹³ In a nationwide broadcast, an ally of the ousted president, Libyan President Muammar Gaddafi condemned the Tunisian uprising and advised Tunisians to adopt the Libyan model of governance which according to Gaddafi, "marks the final destination of the people's quest for democracy."⁴¹⁴

Little did Gaddafi know that, a few months after this speech, Libya would be the next port of call with his regime coming to an end. What began as a street protest against the arrest of a human rights campaigner in Benghazi⁴¹⁵ soon turned to calls

⁴⁰⁹ Hannah Woolaver "Pro-Democratic Intervention in Africa and the Arab Spring" (2014) 22 Afr. J. Int'l & Comp. L. at 161.

⁴¹⁰ At 161.

⁴¹¹ Amax Afaisheer, Will Morocco Be the Arab Spring's Next Greatest Success-or Great Failure?, *The Atlantic* <<http://www.theatlantic.com/international/archive/2011/07/will-morocco-be-the-arab-springs-greatsuccess-or-great-failure/241286>>.

⁴¹² Christian Henderson "International Measures for the Protection of Civilians in Libya and Côte d'Ivoire" 2011 60(03) International and Comparative Law Quarterly at 768.

⁴¹³ Hannah Woolaver "Pro-Democratic Intervention in Africa and the Arab Spring" 2014 22 Afr. J. Int'l & Comp. L. at 161.

⁴¹⁴ Matthew Weaver, "Muammar Gaddafi condemns Tunisian uprising" *The Guardian* 03 Jan. 2016 <<http://www.theguardian.com/world/2011/jan/16/muammar-gaddafi-condemns-tunisia-uprising>>. See also, Muammar Gaddafi Condemns Tunisia Uprising *The Guardian* 03 Jan. 2016 <<http://www.guardian.co.uk/world/2011/jan/16/muammargaddafi-condemns-tunisia-uprising>>.

⁴¹⁵ Geir Ulfstein and Hege Føsum Christiansen "The Legality of the NATO Bombing in Libya" (2013) 62(01) International and Comparative Law Quarterly at 159.

for his resignation and the institution of a democratic government in Libya.⁴¹⁶ Gaddafi, who had never before experienced this level of democratic outcry in his 41-year rule, responded with force.⁴¹⁷ The use of the military instead of the Libyan police was combative and aggressive with the intention of suppressing the rebellion.⁴¹⁸ Vigorous resistance led to the deaths of thousands of civilians,⁴¹⁹ as well as the defection of some of Gaddafi loyal personnel and state structures.⁴²⁰ Gaddafi did not help matters as he interpreted the rebellion as a minor security breakdown that could be stopped with the arbitrary arrests and intimidation that were commonplace under his rule.⁴²¹ He threatened:⁴²²

There are handfuls of people trying to imitate what's happened in Tunisia and Egypt. These are "cockroaches." Officers have been deployed in all tribes and regions so that they can purify all decisions of these "cockroaches." Any Libyan who takes arms against Libya will be executed.

True to his words, the International Criminal Court reported that:⁴²³

Civilians were attacked in their homes; demonstrations were repressed using live ammunition. Heavy artillery was used against participants in funeral processions, and snipers placed to kill those leaving the mosques after the prayers.

Gaddafi justified his actions with claims that the protests were armed rebellions that must be dealt with under Libyan criminal law.⁴²⁴ To some extent, this was an

⁴¹⁶ Hannah Woolaver "Pro-Democratic Intervention in Africa and the Arab Spring" (2014) 22 Afr. J. Int'l & Comp. L. at 172.

⁴¹⁷ Marie-Joe Domestici-Met "Protecting in Libya on Behalf of The International Community" (2011) 3 Goettingen J. Int'l L. 861 at 866.

⁴¹⁸ Alex J Bellamy and Paul D Williams "The New politics of Protection? Côte d'Ivoire, Libya and The Responsibility to Protect" (2011) 87(4) International Affairs 825 at 838

⁴¹⁹ Hannah Woolaver "Pro-Democratic Intervention in Africa and the Arab Spring" (2014) 22 Afr. J. Int'l & Comp. L. at 172.

⁴²⁰ Sam Foster Halabi "Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context" (2011) 27 Am. U. Int'l L. Rev. at 375. As the conflict intensified, the Transitional National Council (NTC) became less relentless in their mission as they fought vigorously for the formation of a democratic society. Their mandate was clear - the overthrow of the Gaddafi government and assumption of office by the interim government of Libya pending a referendum to establish a new democratic constitution and government.

⁴²¹ Hannah Woolaver "Pro-Democratic Intervention in Africa and the Arab Spring" (2014) 22 Afr. J. Int'l & Comp. L. at 172-74.

⁴²² Alex J Bellamy "Libya and The Responsibility to Protect: The Exception and The Norm" (2011) 25(03) Ethics & International Affairs at 265.

⁴²³ ICC Prosecutor: Gaddafi used his absolute authority to commit crimes in Libya' *International Criminal Court* <<http://www.icc-cpi.int/NR/exeres/1365E3B7-8152-4456-942C-A5CD5A51E829.htm>> accessed on 23 January 2016

⁴²⁴ Gaddafi defiant as State Teeters, *Aljazeera*, <<http://english.aljazeera.net/news/africa/2011/02/20112235434767487.html>>. accessed on 23 Jan. 2016

acceptable defence as the country's criminal law strictly prohibits rebellion against a ruling government. However, as the protests escalated beyond the control of the state machinery, Libya automatically became subject to the minimum standard of international law that calls for respect for the fundamental human rights of persons within and outside armed conflict zones.⁴²⁵

Although international law is premised on respect for sovereignty, territorial integrity and states' political independence,⁴²⁶ the use of extreme violence by a government against the citizens it purports to represent calls for international responses based on the need to protect human rights. As such, when the death toll of civilians and gross violations of human rights committed by the regime advanced beyond mere numbers and were relentlessly increasing, the reactions of the international community in rejecting Gaddafi claim that the rebels were "mere cockroaches" to be treated under Libya criminal law became justifiable.⁴²⁷ Also, it demonstrates that most international organisations and states were not in support of human right abuses and undemocratic acts committed by the Gaddafi's regime.⁴²⁸ For instance, the Human Rights Council in its special session on the "Situation of human rights in the Libyan Arab Jamahiriya" urged the Libyan government to respect

⁴²⁵ Hannah Woolaver "Pro-Democratic Intervention in Africa and the Arab Spring" (2014) 22 Afr. J. Int'l & Comp. L. at 173. The UN Charter, the Universal Declaration of Human rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and other regional treaties and obligations contain various provisions on human rights. Libya is a consenting party to these instruments whose enactments supersede state laws and are regarded as fundamental *jus cogens* norms. They cannot be undermined or dissuaded by any state, including Libya, as a justification for the application of its internal laws. In principle, violation of any of the provisions of the enactments in treaties or customary obligations can lead to state action, and the application of Chapter VII provisions of the UN Charter, especially when the nature of the violence or suppression exhibited by a state is inhuman (International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, U.N. Doc.A/6316 (1966), 999 U.N.T.S.368 (1967).

⁴²⁶ Principles of the UN Charter.

⁴²⁷ The Security Council condemned attacks on the civilian population and warned the regime against committing crimes against humanity. The resolution further demanded that the regime cease exercising violence against the civilian population. See Sam Foster Halabi "Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context" (2011) 27 Am. U. Int'l L. Rev. at 375. It should also be noted that the use of military aircraft, heavy weapons, and counter attacks by the rebels shows that the protest had escalated beyond Libya's control.

⁴²⁸ The UN Secretary General made a call to Gaddafi, demanding respect for international law principles and Security Council resolution 1970 of February 26, 2011.

the popular will, aspirations and demands of its people.⁴²⁹ Further, it urged the government to make the utmost effort to prevent further deterioration of the crisis.

Under Chapter VII of its mandate in relation to ensuring international peace and security, the UN Security Council echoed the Human Rights Council's concerns by unanimously adopting Resolution 1970.⁴³⁰ This Resolution, among others, urged an end to the Libyan conflict and fulfilment of the democratic legitimate demands of the people.⁴³¹ These calls were refuted by Gaddafi, who continuously undermined international instructions, including those of the Security Council and the AU.⁴³² Acting under Chapter VII of its mandate, the UN Security Council enforced measures such as an arms embargo, freezing Gaddafi's assets and a no-fly zone in Libya's airspace.⁴³³ Most significantly, the Security Council authorised regional organisations and states to enforce Resolution 1970 by using all necessary means to restore peace, having accepted that Libya was in a civil war.⁴³⁴ Resolution 1973 states:⁴³⁵

The Security Council authorises member States to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians, and civilian populated areas under threat of attack in the Libya Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libya territory.

In a separate communiqué, UN Secretary-General, Ban Ki-Moon⁴³⁶ asserted that:⁴³⁷

⁴²⁹ Human Rights Council Res. S-15/1, Rep. of the Human Rights Council, 15th Spec. Sess. (Feb. 25, 2011) condemning the gross and systematic human rights violations committed by the Gaddafi regime.

⁴³⁰ S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 25, 2011).

⁴³¹ S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 25, 2011), paragraph No. 1

⁴³² Sam Foster Halabi "Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context" (2011) 27 Am. U. Int'l L. Rev. at 374.

⁴³³ Determined to put an end to the continuous violence and threat to international security and peace, and notwithstanding its earlier Resolution 1970, in Resolution 1973, the Security Council reiterated its concern for the plight of refugees and foreign workers that had fled Libya. UN Security Council, Security Council Resolution 1970 (2011), 26 February 2011, 6491st meeting S/RES/1970 (2011),

⁴³⁴ Anne-Marie Slaughter, *Fiddling While Libya Burns* *New York Times*. 23 Jan. 2016

<<http://www.nytimes.com/2011/03/14/opinion/14slaughter.html>>. See also, Philippe Sands, U.N.'s Libya Resolution 1973 is Better Late than Never *The Guardian* 03 Jan.

2016<<http://www.todayszaman.com/newsDetailgetNewsByld.action;jsessionid=6E29AOC962CED36CA72B047C63E46D3C?newsId=239496>>. Noting problems with Security Council Resolution 1973 but nevertheless endorsing its legitimacy based on protecting civilians. See also, Gaddafi, Moral Interventionism Libya, and the Arab Revolutionary Movement: How to Save a Revolution *Todays Zaman* <<http://www.e-ir.info/?p=7703>>.

⁴³⁵ Un SC S/RES/1973 (2011) 17 March 2011.

⁴³⁶ The eighth Secretary-General of the United Nations from January 2007 to December 2016

⁴³⁷ UN Doc. SG/SM/13454, Statement by the United Nations Secretary General, 17 March 2011. Despite the Security Council reiterating that Resolution 1973 aimed to promote order, international peace and security in Libya. The use of the words "all necessary means" authorises individual or collective force. The use of such force seemed not to be about civilians but the forcible overthrow of Gaddafi, including regime change in Libya. The Secretary-General's statement affirms this assertion by

Resolution 1973 affirms clearly and unequivocally, the international community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government.

The AU's reaction to Security Council Resolution 1973 showed elements of disapproval. This was evident in its reports on some African states' rejection of the all "necessary means approach and mandates" in Libya.⁴³⁸ The AU emphasised the importance of legitimacy and the self-determination of the Libyan people to choose their government, undergo political reform, and achieve social justice and economic development.⁴³⁹ Two days after the UN Security Council resolution, it was confirmed that the United States and the United Kingdom had launched more than 110 missiles into Libya.

In addition to the missile attacks, both states sent forces to train the Transitional National Council of Libya (NTC).⁴⁴⁰ The North Atlantic Treaty Organisation (NATO) imposed a No-fly Zone in Libya, and forcibly prevented pro-Gaddafi troops from advancing towards opposition-controlled areas through targeted airstrikes. This led to the death of pro-Gaddafi protesters, members of Gaddafi's family and the loss of some territory controlled by the regime.⁴⁴¹

its systematic use of responsibility to protect (R2P) as a justification for the use of force against the Gaddafi regime.

⁴³⁸ African Union Peace and Security Council 261st Meeting Communiqué of February 23, 2011, (PSC/PR/COMM (CCLXI) See also, African Union Peace and Security Council 265th Meeting Communiqué of March 10, 2011, (PSC/PR/COMM.2(CCLXV). See also, Response to the Situation in Libya ASIL *Insight* 30 Jan. 2016. <<http://www.asil.org/insights110725.cfm>>

⁴³⁹ However, it expressed serious concerns about the efforts of foreign actors i.e. the Security Council and the Western states, undermining Africa efforts to achieve international peace and security by applying non-African solutions to African problems. The AU urged states to refrain from military action in Libya, arguing that it would compound the situation in the territory. It called on the Africa Commission on International Law (ACIL) to consider the legal implications of UN Security Council Resolutions 1970 and 1973. Citing the need to approach the Libyan conflict with caution and road maps, the AU created high-level ad-hoc committees on Libya that were tasked with engaging with all parties to the conflict on the facilitation of peace and appropriate reform. Discrepancies also emerged among some states on the scope and limits of the mandates, particularly on the use of all necessary means in Libya. China and Russia expressed regret and condemned the aerial attacks on Libya. Briefed on the military strikes in the country and support for rebels carried out by NATO, Russian Foreign Minister, Sergei Lavrov stated that, "If this is confirmed, it is a crude violation of United Nations Security Council Resolution 1970." See Declaration of the Ministerial Meeting of the Peace and Security Council on the state of Peace and Security in Africa of April 26, 2011 (PSC/MIN/BR.1 (CCLXXV).

⁴⁴⁰ Alan Cowell & Ravi Somaiya, France and Italy Will Also Send Advisers to Libya Rebels *New York Times* 3 Jan. 2016. <<http://www.nytimes.com/2011/04/21/world/africa/21libya>>

⁴⁴¹ Statement by NATO Secretary General Anders Fogh Rasmussen on Libya *North Atlantic Treaty Organization* <[www.nato.int/press release, March 27, 2011](http://www.nato.int/press_release/March_27_2011), http://www.nato.int/cps/en/natolive/news_71808.htm> accessed on 26 January 2017

In response to the Libyan conflict, France recognised the NTC as the lawful representative government of the country. President Nicolas Sarkozy argued for the need to prevent Libya from becoming a failed state and to promote democracy for all.⁴⁴² France's decision was met with scepticism by some states who viewed the move as irrational.⁴⁴³ For instance, Dutch Prime Minister, Mark Rutte was quoted to have said, "I find it a crazy move by France, to jump ahead and say I will recognise a transitional government in the face of any diplomatic practice. It is not the solution for Libya."⁴⁴⁴ Nevertheless, Qatar, Italy, the USA and the United Kingdom joined France in recognising the NTC as the legitimate representative of Libyans.⁴⁴⁵

The United Kingdom accredited an NTC appointed Ambassador as the Libyan ambassador in London. The government also unfroze the assets of the Arabian Gulf Oil Company, a Libyan company whose assets were frozen during the conflict.⁴⁴⁶ Interestingly, the United Kingdom's actions contradicted its 1980 policy on the recognition of governments.⁴⁴⁷ This illustrates the states shift from the traditional recognition of governments based on the effective control approach to one based on respect for democratic legitimacy.

However, some states rejected this position. For instance, Venezuela stated that it would only recognise the representatives of a constitutionally established government that was the will of the Libyan people.⁴⁴⁸ Bolivia's representative also

⁴⁴² Raf Casert and Don Melvin EU slams France's crazy move on Libya: Seeks One Voice *Daily News* 30 Jan. 2016 <<http://www.arabnews.com/node/370720>>

⁴⁴³ Raf Casert and Don Melvin EU slams France's crazy move on Libya: Seeks One Voice *Daily News* 30 Jan. 2016 <<http://www.arabnews.com/node/370720>>

⁴⁴⁴ Nicholas Watts Nicolas Sarkozy calls for air strikes on Libya if Gaddafi attacks civilians *The Guardian* 30 Jan. 2016 <<http://www.theguardian.com/world/2011/mar/11/nicolas-sarkozy-libya-air-strikes>>

⁴⁴⁵ British Foreign Secretary, William Hague declared that "the Prime Minister and I have decided that the United Kingdom recognises and will deal with the National Transitional Council as the sole governmental authority in Libya. This decision reflects the NTC increasing legitimacy, competence and success in reaching out to Libyans across the country. Through its actions, the NTC has shown its commitment to a more open and democratic Libya - something that it is working to achieve through an inclusive political process. This is in stark contrast to Gaddafi, whose brutality against the Libyan people has stripped him of all legitimacy." Foreign & Commonwealth Office and The Rt Hon William Hague MP: Working for peace and long-term stability in the Middle East and North Africa, National security, Defence and Armed Forces, *Foreign Affairs* others <<http://www.fco.gov.uk/en/news/latestnews/?view=News&id=635937682>> accessed on 30 Jan. 2016

⁴⁴⁶ Patrick Capps "British Policy on the Recognition of Governments" 2014(2) Public law, at 229

⁴⁴⁷ At 229.

⁴⁴⁸ Venezuela's representative stated that the Assembly was being asked to recognise a group working under the guidance of the United States Government and NATO, which had no legal or moral authority

rejected recognition of the NTC, describing it as a violation of Libyans' self-determination.⁴⁴⁹ The Nicaraguan representative expressed his displeasure by stating "Let me be clear, a unity government has not been formed, and the National Transitional Council had committed itself to do so and crafting a new constitution and a free Libya."

Regardless of different states' positions on recognising the NTC, it was clear that Gaddafi was in effective control of substantial parts of Libya, including Tripoli, the state capital,⁴⁵⁰ and doubt was cast on the unity of the NTC. Nonetheless, the General Assembly recognised the NTC as Libya's representative for its sixty-sixth session. Such premature recognition was a clear breach of Article 2(7) of the UN Charter. As discussed earlier, the effective control test should have come into effect as soon as the Security Council accepted and declared that Libya was in a state of civil war.⁴⁵¹ The Gaddafi regime thus remained the lawful government of Libya pending the loss of its efficacy.⁴⁵² Any assistance to or recognition of an opposition group would violate the effective control doctrine. The only logical explanation for states and the General Assembly's recognition of the NTC is undemocratic practice by the Gaddafi's regime.

Article 25 of the ICCPR and Article 21 of the UDHR entitled Libyans to certain obligations under the Gaddafi regime, namely, non-discrimination in the exercise of self-determination and the political right to participate in elections. Undue restrictions because of discrimination on the grounds of class, sex, and age, denial of

to decide who should govern a nation. NATO's belligerent conduct violated the principles of sovereignty and non-intervention in the internal affairs of a State. It also represented an act of aggression, which negated any humanitarian purpose. The perpetrators of those crimes must be brought to the International Criminal Court. The Assembly's recognition of the National Transitional Council as Libya's Government represented an "abominable precedent" that violated the most elementary principles of international law. See UN GA 11137 16 September 2011. Also "After Much Wrangling, General Assembly Seats National Transitional Council of Libya as Country's Representative for Sixty-Sixth Session" <<http://www.un.org/press/en/2011/ga11137.doc.htm>>

⁴⁴⁹ Bolivia's representatives discussed the implications of Libyans' on-going suffering and the violation of their sovereignty as a result of their inability to express their opinions or establish the government of their choice. UN GA 11137 16 September 2011

⁴⁵⁰ Patrick Capps "British Policy on the Recognition of Governments" (2014) 2 Public law at 229.

⁴⁵¹ Patrick Capps "British Policy on the Recognition of Governments" (2014) 2 Public law at 230.

⁴⁵² As explained by Hans Kelsen, "Under international law, a legal order is valid as it becomes efficacious and it immediately loses its validity as soon as it loses its efficacy."

suffrage to minors, professional training, and political ideology, mental illness, etc. are explicitly prohibited under this provision.

However, during Gaddafi's rule, unreasonable restrictions were placed on membership of the Arab Socialist Union, which was the only political party in Libya.⁴⁵³ Not only was membership of the party restricted to specific categories, Libyans right to participate in the political structure and development of their society systematically controlled.⁴⁵⁴

Parliamentary participation and representation were dependent on government selected revolutionary committees (RCs) whose decisions were subject to implementation by Gaddafi himself.⁴⁵⁵ Participation thus centred on representatives rather than the people. Libyans literally lacked political freedom to express their will and participate fully in matters relating to the sovereignty of the country.⁴⁵⁶ After the fall of the regime and the death of Gaddafi in 2011, an independent investigation by Human Rights Watch documented a large number of renditions, torture and inhuman activities committed by the government against Libyans abroad, although at times with the complicity of Western intelligence agencies.⁴⁵⁷

⁴⁵³ Article 25 of the ICCPR and Article 21 of the UDHR assert citizen right to directly or indirectly participate in the conduct of the affairs of states through their chosen representatives without unreasonable restrictions. Article 25 of the ICCPR which gives specific expression to Article 21 of the UDHR provides that Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections; this shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. (c) To have access, on general terms of equality, to public service in his country. See, Kimberly L Sullivan *Muammar Al-Gaddafi's Libya* (Twenty-First Century Books, 2008) at 32.

⁴⁵⁴ Helen Chapin Metz, ed. *Libya: A Country Study*. Washington: GPO *Library of Congress* 03 Mar. 2016 < <http://countrystudies.us/libya/> >

⁴⁵⁵ Kimberly L Sullivan *Muammar Al-Gaddafi's Libya* (Twenty-First Century Books, 2008) at 32.

⁴⁵⁶ Unchecked by the rules of governance and with all vestiges of civil society destroyed and vast oil wealth at his disposal, Gaddafi was able to build an anti-imperialist economy fuelled by dictatorship and terrorist activities. Training camps primed guerrillas for a supposed world revolution; free training, infrastructure and pay were offered depending on the success of their operations. M Cherif Bassiouni *Libya: From Repression to Revolution: A Record of Armed Conflict and International Law Violations, 2011-2013* (Martinus Nijhoff Publishers, 2013) at 67. M Cherif Bassiouni *Libya: From Repression to Revolution: A Record of Armed Conflict and International Law Violations, 2011-2013* (Martinus Nijhoff Publishers, 2013) at 67. Brian Lee Davis *Qaddafi, Terrorism, and The Origins of the US Attack on Libya* (ABC-CLIO, 1990) at 6.

⁴⁵⁷ *Delivered into Enemy Hands: US Led Abuse and Rendition of opponents of Gaddafi's Libya Human Right Watch* 2016 < <http://www.hrw.org/fr/node/109782> > accessed on 15 November 2019

In July 2012, after Libya National elections, the democratically elected government of the General National Council (GNC) took over governance of Libya from the NTC.⁴⁵⁸ However, by 2013, Libyan political situations had deteriorated mainly because a consensus could not be reached on the roles of majority and minority stakeholders of the conflict.⁴⁵⁹ The political turmoil intensifies with increasing number of armed attacks challenging the GNC government. Soon after, a Coup led to the ousting of Libyan acting Prime Minister, Minister Ali Zeidan through Operation Dignity, also known as Operation Karama in Libya.⁴⁶⁰

The GNC was challenged, and re-election was demanded. In response, a democratic election was held on the 26 August 2014 in Libya. However, the election was marred with irregularities. Questions arose as to the voting of representatives and the constitutionality of the election due to the voters voting based on religion and tribal affiliations.⁴⁶¹

Following an internal armed conflict, the Dawn coalition emerged. The Internationally recognised and democratically elected House of Representatives (HoR) was declared illegal and unconstitutional by Libya Supreme Court. The decision left Libya without a recognised government, widening the fight for power and international recognition.⁴⁶² Consequentially Libyan was divided between two rival governments of the GNC and the House of Representative (HoR) that emerged from the democratic election.

In December 2015, after the Libyan Political Agreement was signed, the Government of National Accord (GNA) came into power as the legitimate and

⁴⁵⁸ Zineb Abdessadok Libya Today: From Arab Spring to failed state *War and Conflict* Libya Today: From Arab Spring to failed state <<https://www.aljazeera.com/indepth/features/2017/04/happening-libya-today-170418083223563.html>>.

⁴⁵⁹ Elif Ersen Post-Gadhafi Libya: Crippled By Continuous Clashes, Political Instability Daily *Bach: Africa* <<https://www.dailysabah.com/africa/2019/06/22/post-qadhafi-libya-crippled-by-continuous-clashes-political-instability>> accessed on 6 November 2019.

⁴⁶⁰ The aim was to target groups such as the Shura Council of Benghazi Revolutionaries in Benghazi (of which Ansar al-Sharia and other armed Islamists were part), which largely rejected the formal political process at the time (the Islamists were at the time influential and in control of parts of Tripoli).

⁴⁶¹ Libyan National Army Reaches Tripoli's Outskirt (Map)" *South Front* <<https://southfront.org/libyan-national-army-reaches-tripolis-outskirt-map/>> 6 April 2019.

⁴⁶² Mohamed Eljarh, 'The Supreme Court Decision That's Ripping Libya Apart' *Foreign Policy News* <<https://foreignpolicy.com/2014/11/06/the-supreme-court-decision-thats-ripping-libya-apart/>> accessed on 10 November 2019.

internationally recognised government of Libya.⁴⁶³ Despite its international recognition, the GNA was not nationally recognised by the HoR due to non-agreement on some issues. On 4 April 2019, ten days to Libya National Conference for the planning of Libya Presidential and Parliamentary election, "Operation Flood of Dignity" which is another form of conflict was launched.⁴⁶⁴ As at the time of completing this study, Libya is in armed conflict with ongoing human rights violations.⁴⁶⁵

5.4. Comparative Analysis Discussion: Democratic Legitimacy Barriers

Contrary to claims that democratic legitimacy would be a suitable replacement of the effective control doctrine, it is clear from this chapter that democratic legitimacy is not fully accepted by states as the sole approach to recognition of governments. One of the main reasons for this assertion as noticed in Haiti and Libya case studies is that there was high level of inconsistency in state practices. The inconsistencies were demonstrated at one point by some states, such as France and the United Kingdom, recognition of the NTC on the basis of democracy and the condemnation of such recognition by some other states. For example, the Dutch Prime Minister considered it a crazy move by France; similarly, Bolivia rejected the recognition and found it a violation of Libyan's self-determination and Sovereignty.⁴⁶⁶ Another example was the conflicting reaction of International Organisations such as the United Nations, NATO and in particular, the African Union to Libya conflict.⁴⁶⁷ While the UN Human Rights

⁴⁶³ United Nations, "UN welcomes 'historic' signing of Libyan Political Agreement" *Peace and Security* <<https://news.un.org/en/story/2015/12/518412-un-welcomes-historic-signing-libyan-political-agreement#.VyJoBKMrLKI>>.

⁴⁶⁴ UN chief issues stark Libya warning as fighting rages south of Tripoli <<https://www.arabnews.com/node/1478066/middle-east>> *Arab News* accessed on 6 April 2019.
"Libyan National Army declares no-fly zone in the west of the country" *TASS* <<https://tass.com/world/1052444>> accessed on 5 November 2019.

⁴⁶⁵ Haftar's forces launch attack on closed Mitiga Airport in Libya's capital *Libyan Express* <<https://www.libyanexpress.com/haftars-forces-launch-attack-on-closed-mitiga-airport-in-libyas-capital/>> accessed on 1 October 2019. Haftar's Forces Launch Attack On Closed Mitiga Airport In Libya's Capital *Libyan Express* <<https://www.libyanexpress.com/haftars-forces-launch-attack-on-closed-mitiga-airport-in-libyas-capital/>> accessed on 2 November 2019.

⁴⁶⁶ Bolivia's representatives discussed the implications of Libyans' on-going suffering and the violation of their sovereignty as a result of their inability to express their opinions or establish the government of their choice. See Patrick Capps "British Policy on the Recognition of Governments" (2014) 2 Public law at 229.

⁴⁶⁷ The African Union expressed serious concerns about the efforts of foreign actors i.e. the Security Council and the Western states, undermining Africa efforts to achieve international peace and security by applying non-African solutions to African problems. The AU urged states to refrain from military

Council urged the Gaddafi regime to respect the popular will, demand and aspiration of the people with the UN Security Council using its Chapter IV mandate, the African Union reaction was the opposite.⁴⁶⁸ The African Union emphasised the importance of the effective control doctrine and condemned the UN and NATO reaction to Libya conflict by releasing a communique emphasising that "African problems demand African solutions."⁴⁶⁹

The Libya conflicts is not the only justification for this conclusion. Another example that demonstrates inconsistency in states practices supporting a notion of democratic legitimacy is the continued tolerance of coups regimes and regimes that are popular rebellions against authoritarian governments despite such regime's undemocratic origins. These inconsistencies were obvious during the Arab spring in particular with Libya (2011), Egypt (2013), Mali (2012) and of recent Zimbabwe (2018). In Egypt (2013), the African Union had outrightly condemned the overthrow of the democratically elected President Mubarak Morsi by calling for the restoration of democracy in Egypt. However, inconsistency plagued the United States, the European Union and some other states who did not condemn the Egypt coup and demand the reinstatement of President Morsi.⁴⁷⁰ Similarly, while the African Union

action in Libya, arguing that it would compound the situation in the territory. It called on the Africa Commission on International Law (ACIL) to consider the legal implications of UN Security Council Resolutions 1970 and 1973. Citing the need to approach the Libyan conflict with caution and road maps, the AU created high-level ad-hoc committees on Libya that were tasked with engaging with all parties to the conflict on the facilitation of peace and appropriate reform. Discrepancies also emerged among some states on the scope and limits of the mandates, particularly on the use of all necessary means in Libya. China and Russia expressed regret and condemned the aerial attacks on Libya. Briefed on the military strikes in the country and support for rebels carried out by NATO, Russian Foreign Minister, Sergei Lavrov stated that, "If this is confirmed, it is a crude violation of United Nations Security Council Resolution 1970." See Declaration of the Ministerial Meeting of the Peace and Security Council on the state of Peace and Security in Africa of April 26, 2011.

⁴⁶⁷ Alan Cowell & Ravi Somaiya, France and Italy Will Also Send Advisers to Libya Rebels *New York Times* 3 Jan. 2016. <<http://www.nytimes.com/2011/04/21/world/africa/21libya>>

⁴⁶⁷ Statement by NATO Secretary General Anders Fogh Rasmussen on Libya North *Atlantic Treaty Organization* <http://www.nato.int/cps/en/natolive/news_71808.htm> accessed on the 25 November 2019.

⁴⁶⁸ Human Rights Council Res. S-15/1, Rep. of the Human Rights Council, 15th Spec. Sess. (Feb. 25, 2011) condemning the gross and systematic human rights violations committed by the Gaddafi regime. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 25, 2011), paragraph No. 1

⁴⁶⁹ African Union Peace and Security Council 261st Meeting Communiqué of February 23, 2011, (PSC/PR/COMM (CCLXI) See also, African Union Peace and Security Council 265th Meeting Communiqué of March 10, 2011, (PSC/PR/COMM.2(CCLXV). See also, Response to the Situation in Libya ASIL *Insight* 30 Jan. 2016. <<http://www.asil.org/insights110725.cfm>>

⁴⁷⁰ See Erika De Wet "From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition." (2014) 108 *AJIL Unbound* at 205. Peace and Security Council

(AU) outrightly condemned and suspended the government that came into effective control of Guinea Bissau by Coup, the Economic Community of West African States (ECOWAS) worked with the same coup government on the shadow of intending to restore democracy.⁴⁷¹ Therefore, evidence of acceptance and uniformity in international practice for democratic legitimacy is absent. Thus, democratic legitimacy is not yet fully accepted as a measure for the recognition of governments and a sustainable replacement of the effective control doctrine.

Secondly, the lack of a consolidated accepted global-level international rule against the recognition of undemocratically installed governments (similar to the OAS approach discussed in Haiti Case study) makes the prediction of democratic legitimacy as a sustainable replacement of the effective control doctrine less realistic.⁴⁷² As at the time of completing this study, evidence from state practices in response to the Egypt, Ukraine, Syria and South Sudan conflicts shows that states are more interested in installing friendly regimes than in the democratic nature of such governments. Perhaps, lessons seem to have been learned from Libya intervention and its aftermath. Although, there are treaties such as the International Covenant on Civil and Political Rights (ICCPR) that obligates states with democratic rights of citizens, these treaties simply do not deal with the situation of non-recognition of undemocratic governments. Also, this treaty provisions, as stated earlier, are not *Jus Cogen* obligations, i.e. peremptory norms of international law that permits no derogations. Where the treaty provisions conflict with the national security or public policy of a state, customary international law has shown evidence of derogation as evidence in current Syria and the ISIL situation. Given this, democratic legitimacy clearly not the perfect solution.

of the African Union (AU), Communiqué of the 318th Meeting of the Peace and Security Council, PSC/PR/COMM(CCCXVIII) (Apr. 17, 2012). Security Council, Situation in Guinea-Bissau Marked by Insecurity, Impunity, Despite Recent Political Progress towards Development of Transitional Road Map, Security Council Told, SC/10907 (Feb. 5, 2013).

⁴⁷¹ ECOWAS, Extraordinary Session of the Authority of ECOWAS Heads of State and Government: Final Communiqué (Nov. 11, 2012)

⁴⁷² This finding has led some authors to contend that there exist “double standards” in that regard. Gregory Fox “Election Monitoring: The International Legal Setting” (2001) 19 *Wisconsin International Law Journal* at 295, 312.

Thirdly, without any doubts, the twentieth century has been replete with examples of the use of democratic legitimacy as an approach for recognising governments and indeed with Haiti, democratic legitimacy in relation to the recognition of governments could arguably be claimed to have entered another epoch. However, the question is whether states are ready for an era where democracy will be practised to its absolute core, i.e. democracy will be the only approach for validating governance in both armed and non-armed conflicts situations. Since the claims of democratic legitimacy as a solution to the recognition of governments controversies and a sustainable replacement of the effective control doctrine, there have been fewer cases like Haiti or derecognition of a government or the sanction of a government based on it emerging as an undemocratic government.⁴⁷³ The United States' effort to place sanctions on the Cuban government which came into power undemocratically through the 1996 Helms-Burton Act was met with vigorous condemnation by states such as the UK, Canada, Mexico and even the European Union who consider it an attack on international law and the sovereignty of Cuba.⁴⁷⁴ As at the time of completing this study, the US is facing ongoing legal battles relating to the Helms-Burton Act.⁴⁷⁵ This confirms that some states will continue to transact with undemocratic regimes and the effective control doctrine has not been totally eradicated from international law.

Fourthly, international organisations such as the United Nations, African Union and European Unions since the high-water mark of Libya (which is ongoing) remain indifferent to the effective control doctrine. Undeniably, democratic legitimacy projects some advantages (as discussed in previous sections) that cannot easily be replicated by the effective control doctrine. However, due to some democracy deficits such as what it entails, its meaning and the process to attain an

⁴⁷³ Jean Aspermont "The Pipe Dream of Constraining Recognition Through Democracy: International Lawyers' Regulatory Project Continued" (2014) 108 *AJIL Unbound* at 220.

⁴⁷⁴ The European Union enforces EU Council regulation 2271/96 sanctioning US companies < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996R2271:EN:HTML> > United Kingdom reaction at <<http://www.legislation.gov.uk/ukxi/1992/2449/contents/made>> and <"[The Extraterritorial US Legislation \(Sanctions against Cuba, Iran and Libya\) \(Protection of Trading Interests\) Order 1996](#)">

⁴⁷⁵ Lioman Lima, Helms-Burton Act: US firms face lawsuits over seized Cuban land *BBC* <<https://www.bbc.com/news/world-us-canada-48113549>>

absolute democracy as noted in the ongoing Libya conflict,⁴⁷⁶ democratic legitimacy ceases to be a suitable replacement of the effective control doctrine. While some states will continue to apply democratic legitimacy as part of their recognition policies when recognising governments, it is obvious that the effective control doctrine has not been totally replaced. Rather, in the absence of a global level declaration or an international treaty provision on democratic legitimacy, both recognition of governments approaches will continue to be used depending on individual states policies and case by case situations. Supporting evidence to this claim is the recent military-like coup against democratically elected President Robert Mugabe of Zimbabwe.⁴⁷⁷ While Zambia and some African states expressed concerns as to the illegality of the Coup, and the African Union stated that it would never accept the coup,⁴⁷⁸ no sanction or non-recognition was placed on the coup regime.

Fifthly, while there is a strong move to consolidate democracy globally such as that similar to the Organisation of America States in Haiti, different constitutional frameworks and system of governance make such move hard, challenging and unsustainable.⁴⁷⁹ For example, Libya constitutional framework before the fall of Gaddafi shows a different form of democracy to those practised in other Arabian Regions. As explained earlier, Libyan parliamentary participation and representation were dependent on government selected revolutionary committees (RCs) whose decisions were subject to implementation by Gaddafi himself.⁴⁸⁰ Participation thus centred on RCs representatives rather than Libyans. Until the conceptual definition problem of what is democracy is resolved, democratic legitimacy ceases to be the perfect solution and a suitable replacement of the effective control doctrine.

Sixthly, the key elements of democratic legitimacy in relation to the recognition of governments has always been argued as electoral processes. However, a serious threat to it is political intolerance. Many of the democratic oppositions that

⁴⁷⁶ This is obvious and is one of the major roots of Libya ongoing armed conflict in relation to voting based on tribal and religious affiliations.

⁴⁷⁷ Zimbabwe takeover seems like a coup, African Union says *BBC News* <<https://www.bbc.com/news/world-africa-42004816>> accessed on 18 November 2019.

⁴⁷⁸ William Saunderson-Meyer *Reuters* <<https://www.reuters.com/article/us-saunderson-zimbabwe-commentary/commentary-africas-deft-handling-of-zimbabwes-coup-iduskbn1dl2rp>>

⁴⁷⁹ Stepan Alfred and Cindy Skach "Constitutional frameworks and democratic consolidation: Parliamentary versus presidentialism" (1993) 46 *World politics* at 1.

⁴⁸⁰ Kimberly L Sullivan *Muammar Al-Gaddafi's Libya* (Twenty-First Century Books, 2008) at 32.

performed well during the Arab Spring, especially in Libya are not in the true sense committed to democracy and had their own political agenda. The general assumption is always that whoever was democratically recognised would carry a form of moral legitimacy. Yet, Libya GNC and Egypt Brotherhood failed after each state regime changes to attain such legitimacy. The elections in these two states at the time of writings have neither produced political stability nor any form of legitimacy.⁴⁸¹ Therefore, an extensive restructuring of democratic legitimacy through existing international, regional and national mechanisms is essential before it can be assumed as a sustainable and perfect solution to the recognition of government problems. In the absence, democratic legitimacy ceases to be the perfect solution and a suitable replacement of the effective control doctrine.

Seventhly, democratic legitimacy as a suitable replacement of the effective control doctrine and the solution to the recognition of government controversies is an unattractive conclusion. Analysis in this study demonstrates evidence of striking similarity between Thomas Jefferson approach and democratic legitimacy.⁴⁸² Democratic legitimacy is indisputably a remodel of the content, purpose and scope of Thomas Jefferson approach. This similarity is easily identified in the decisive test of both approach and the problems faced by both approaches. As explained in Chapter Four, the decisive test for Thomas Jefferson approach is "the will of the people shall be the basis of governance", this in a reform term is what democracy entails and the requirement of recognition under the democratic legitimacy approach.

Finally, as discussed in Chapter four, evidence demonstrated that rather than states resorting to a clear-cut framework of recognition, states instead weight various amorphous policy to quantify democracy as a result of lack of definition for democracy. There have been different forms of democracy such as new democracy, procedural democracy, normative democracy, substantive democracy etc, despite these numerous democracies, understanding what democracy entails remains a problem. Given this, in the absence of a workable substantive definition of democracy

⁴⁸¹ Alfadhel Khalifa A "Toward an Instrumental Right to Democracy." (2018) 112 *AJIL Unbound* 112 at 87.

⁴⁸² The will of the people substantially declared" as a as the basis of recognising any government. is parallel striking with democratic legitimacy component of democracy which is consider as "government formed by the will of the people."

for international law purposes, democratic legitimacy is not the perfect solution because there are at present no consensus about democracy and its underlying purpose.⁴⁸³

5.5. Conclusion

In conclusion, the author returns to the main research question: can democratic legitimacy be a solution to the recognition of government problems, and can it be a sustainable replacement of the effective control doctrine? The author's answer is in the negative. Is it worth celebrating compared to other recognition of government approaches? The author's answer here is affirmative but qualified in terms of the significant features it has compared to other recognition of government approach. However, it is not the perfect solution.

⁴⁸³ Brad Roth "Whither Democratic Legitimism? Contextualizing Recent Developments in the Recognition and Non-recognition of Governments" (2014) 108 *AJIL Unbound* at 213-218.

Chapter Six: Towards an Effective Solution: A Modified Effective Control Doctrine

6.1. Introduction

The previous Chapters of this study examine the recognition of government controversies. A variety of possible solutions put forward by some states and academics were examined in Chapter Four of this study, and it was established that none of the solutions could indisputably solve the recognition of government controversies or could be classified as a suitable and sustainable approach.

Chapter Five of this study examined the claims of some academics that the most recent emerged approach to recognition of governments (democratic legitimacy) has arrived in international law as a solution and a sustainable replacement of the current dominant approach the effective control doctrine.⁴⁸⁴

Relying on a comparative analysis of the effective control doctrine and democratic legitimacy, the author was able to conclude that though democratic legitimacy is a better solution than the effective control doctrine, some barriers hinder it from being a sustainable solution.

Accordingly, the objective of this Chapter is to recommend an effective solution that is capable of overcoming and eliminating all, or at least most, of the drawbacks affecting the recognition of governments in international law. In so doing, this Chapter suggests a better and more sustainable approach by building upon the solutions of some states and academics discussed in Chapter Four of this study.

This Chapter consists of eight sections. The next section considers whether the current recognition of government approach (the effective control doctrine) needs to be replaced or modified. The third section of this Chapter reviews the

⁴⁸⁴Christina Cerna "Democratic Legitimacy and Respect for Human Rights: The New Gold Standard" (2014) 108 AJIL Unbound 108 at 222-227. Obiora Chinedu Okafor "Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet." (2014) 108 AJIL Unbound at 228-232. Saranti Vasiliki. "Democratic Legitimacy as an Approach for Recognizing a Government: Towards the Emergence of a Regional Customary Rule in the Americas? A Reply to Professor Erika de Wet." (2014) 108 AJIL Unbound at 233-238. Jure Vidmar "Democratic Legitimacy between Port-au-Prince and Cairo: A Reply to Erika de Wet" (2014) 108 AJIL Unbound at 208-212. James Gathii "Introduction to the AJIL Unbound Symposium on Recognition of Governments and Customary International Law" (2014) 108 AJIL Unbound at 199-200. Brad Roth "Whither Democratic Legitimism? Contextualizing Recent Developments in the Recognition and Non-recognition of Governments" (2014) 108 AJIL Unbound at 213-218.

recognition of government controversies discussed in Chapters Two and Three to identify the claims against the effective control doctrine. Using comparative analysis, the fourth section of this Chapter examines whether there are additional factors other than the drawbacks identified against the effective control doctrine in the previous section. The fifth sections discuss the result of the comparative analysis, recommends a solution to the drawbacks of the effective control doctrine and explains the justification for the recommendation. The sixth section of this study explains how the recommendation could be applied in recognition of government instances, and the seventh section, by revisiting Libya conflict explains how the recommended solution would create better outcomes than the present. The eighth section concludes.

6.2. Should the Effective Control Doctrine be Modified or Replaced?

From the sixteenth century to the middle of the twentieth century, recognition of government did not concern itself with democratic forms of government as it is doing in the twentieth century. The traditional approach that most states applied when the need to recognise a government arose was the effective control doctrine. However, since the 1992 pro-democratic intervention in Haiti, and the consolidation of democracy by the OAS, changes are being asserted as to how governments should be recognised, and indeed a new approach has emerged.

This new approach, democratic legitimacy, although it addresses some recognition of governments problems, it also raises some concerns such as questioning the origins of governments, the relationship between who governs and the governed. It is unlike the effective control doctrine that respects the autonomy of states by not tolerating any form of enquiry into how a government is formed or its underlying policies. For these reasons and others discussed in this section, the author proposes that effective control should be maintained but modified to meet the current demands of the recognition of governments in international law.

One of the main reasons is that inconsistency continues to affect the recognition of government practices with states switching from one approach to another over the last few decades. However, evidence demonstrates that the effective control doctrine is the only approach that has not fallen prey to consistent changes in the name of a solution to the recognition of government controversies.

The effective control doctrine has been in existence since the sixteenth century. It witnessed the demise of the Jefferson, Tobar and Estrada recognition of government practices. It has consistently stood the test of time despite inconsistent state practice and most likely will surpass the current hype of democratic legitimacy. This is because the democratic legitimacy approach, as evidenced in Chapter Four and discussed in Chapter Five is a modern remodel of the Thomas Jefferson approach. Having an approach that has been in line with the principle of sovereignty since the Westphalia paradigm, duly established doctrine in other areas of international law, tested over time and has served as a solution to other international law matters is far more suitable.

Secondly, democratic legitimacy ceases to serve as a straitjacket replacement of the effective control doctrine when considering that democratic legitimacy as an approach for the recognition of governments is no longer an emerging norm, it has been in existence since the twentieth century. Yet, it has still not fully established itself as the dominant recognition of government approach. One primary reason is that democracy cannot fill the internal voids that occur after the decentralisation of a constitutional order and impromptu regime changes.⁴⁸⁵ The one recognition of government approach that remains the crucial yardstick to determine the better-placed government in such circumstance is the effective control doctrine. As of today, international law has not provided any other viable options to fill the void for such circumstance should the effective control doctrine be removed. For instance, in 2014 General Prayat Chan o Cha, the commander of the Royal Thai Army (RTA) was able to maintain political stability and operate as the Prime Minister of Thailand after six months of political crisis in the state due to the effective control doctrine.⁴⁸⁶ Five years later, he is still the Prime Minister of Thailand and continues to maintain peace in the state. No other recognition of government approach could have filled

⁴⁸⁵ Brad Roth "Secessions, Coups and The International Rule of Law: Assessing the Decline of The Effective Control Doctrine" (2010) 11 *Melb. J. Int'l L.* 11 At 395

⁴⁸⁶ Taylor Adam and Kaphle, Anup "Thailand's army just announced a coup. Here are 11 other Thai coups since 1932" *Washington Post* <<https://www.washingtonpost.com/news/worldviews/wp/2014/05/20/thailands-army-says-this-definitely-isnt-a-coup-heres-11-times-it-definitely-was/>> accessed on 19 October 2018.

Thailand's governmental void during the impromptu military coup than the effective control doctrine.

Thirdly, as noted in the context of the post-Gaddafi regime change, democratic legitimacy does not appear to be more orderly, consensual, or stable than the effective control doctrine. Continuous disagreement on new rules, constitutions and institutions continues to affect democratic processes and causes insecurity. On the other hand, the effective control doctrine projects stability as soon as a period of conflict is over. A typical example is Zimbabwe where the effective control doctrine was applied as a result of a coup d'etat against President Robert Mugabe. Zimbabwe is now more politically stable than Libya, whose mode of recognition during its regime change was democratic legitimacy. As at the time of writing, the Libya war remains extremely messy, and attempts to create a unified democratic government have been unsuccessful due to rivalry contest of power between the HoR, the GNA and General Khalifa Haftar, the leader of the Libyan National Army.⁴⁸⁷ The democratic rights of Libyans are at stake with high death tolls and human rights abuses. Besides, the United Nations Secretary-General was unable to finalise a democratic peace deal,⁴⁸⁸ and the war has reached a stage where Libya's sovereignty is under armed attack by Islamist fundamentalists.⁴⁸⁹

Fourthly, the international system and those calling for the replacement of the effective control doctrine have not explained how the vacuum that will be created by its removal will be filled during certain recognition circumstances, should it be replaced. For example, how would the status of the rightful holder of authority be determined in these three circumstances: (a) when there is a forcible overthrow of an existing government during coup instances, (b) accession to power of a new

⁴⁸⁷ Civil War in Libya Global Conflict Tracker: Council on Foreign Relations
<<https://www.cfr.org/interactive/global-conflict-tracker/conflict/civil-war-libya>> last updated on 5 November 2019 accessed on 6 November 2019.

⁴⁸⁸ Offensive du maréchal Haftar en Libye : l'ONU met en garde la "tentation de l'homme fort [Marshal Haftar offensive in Libya: the UN warns of the "strongman temptation"] (in French)<<https://www.france24.com/fr/20190429-onu-ghassan-salame-met-garde-contre-tentation-homme-fort-libye-haftar>> accessed on 1 May 2019.

⁴⁸⁹ Arrival of Russian mercenaries adds deadlier firepower, modern tactics to Libya's civil war *The Washington Post* <https://www.washingtonpost.com/world/arrival-of-russian-mercenaries-adds-deadlier-firepower-modern-tactics-to-libyas-civil-war/2019/11/05/f330820c-fa03-11e9-9534-e0dbcc9f5683_story.html> accessed on 6 November 2019.

government by a procedure not provided for by the constitution of a state, or (c) when a state invites other states to carry out military operation in its territory. An alternative solution to these highlighted circumstances other than the effective control doctrine is not only elusive because of *realpolitik* but could mean the establishment of new principles that may destabilise other generally established international law principles that are linked to the effective control doctrine and recognition. An example of such established principle is the recognition of state, military intervention by invitation and humanitarian intervention by request of a government that is in effective control of an armed conflict.

Fifthly, a departure from the effective control doctrine would also open an enquiry into the legality of the three listed recognition circumstances discussed in the previous paragraph thus resulting in external interference that the international system in the first place had good reasons to which to object. It would also contravene some United Nations Charter provisions and would result in the kind of unconstrained external intervention in the internal affairs of other states which in the first place is what those calling for the abolition of the recognition of governments in international law seeks to preclude. As explained in Chapter Four, the effective control doctrine protects the autonomy and sovereignty of states by ensuring such practices are not permitted. Furthermore, the effective control doctrine effectuates Article 2(7) of the United Nations Charter by ensuring no interference in the domestic affairs of other states.⁴⁹⁰ Besides, there have been pro-democratic interventions that violate state sovereignty. For example, in Haiti, Aristide issued no invitation. Therefore, a modification in its current practice is the answer rather than abolition.

Sixthly, two possible justifications explain the continued existence of the effective control doctrine and why efficacy and control are the primary determinants of the effective control doctrine's legitimacy. The first reason as suggested by Redmond is that the effective control doctrine serves the wider goal of inhibiting intervention by promoting autonomy and peace between nations by allowing

⁴⁹⁰ Nina Agrawal Military Coups, Regime Change...: The CIA Has Interfered in Over 81 Foreign Elections *Global Research*
<https://www.globalresearch.ca/military-coups-regime-change-the-cia-has-interfered-in-over-81-foreign-elections/5567422?utm_campaign=magnet&utm_source=article_page&utm_medium=related_articles> accessed on 15 November 2019.

legitimacy to turn on a single fact that may be easily verified.⁴⁹¹ The second reason as postulated by Farer is that the effective control doctrine is pragmatically a form of legitimism rather than the misconstrued "might against right" that is often antagonistically used against the doctrine.⁴⁹² The reason for this is simple if the people follow the will of the government by allowing the government to *control them effectively*, then it can be assumed that despite the unconstitutional origin of the government, the population is in accord with the government.

Seventhly, as explained in the overview of the effective control doctrine in Chapter Four, the principle has been in existence since the sixteenth century. The drafters of the effective control doctrine could not have foreseen nor envisaged the occurrence of the modern-day democratic revolutions as at the time of drafting the doctrine. The effective control doctrine was developed after the signing of the Westphalia Peace Treaty to meet the recognition of governments problem of the time, which was common with putsches. The author position's is not to say that because it has been the oldest operated recognition of government approach it should be maintained. Rather, because the approach was developed to solve a problem of the sixteenth century, a modified approach of the doctrine to meet the twentieth-century recognition of government needs is essential.

Eighthly, democratic legitimacy cannot be sustained as a recognition of government approach without a constitutional ethos, because not all governments are democratic and inimical to democracy.⁴⁹³ At present, international law relating to democratisation is surrounded by conflicting interests, and conflicting political moralities where implementers of supposed universal values are untrusted. As observed by Roth:⁴⁹⁴

A thorough-going democratic legitimism is unpromising as an international norm, and a potential source of mischief as a unilateralist initiative.

⁴⁹¹ Trevor Redmond "Power to the People-Intervention to Restore Democracy" (2004) 12 ISLR at 6

⁴⁹² Tom Farer "Panama: Beyond the Charter Paradigm" (1990) 84 American Journal of International Law at 511.

⁴⁹³ Brad Roth "Secessions, Coups and The International Rule of Law: Assessing the Decline Of The Effective Control Doctrine" (2010) 11 *Melb. J. Int'l L.* at 440

⁴⁹⁴ Brad Roth "Whither Democratic Legitimism? Contextualizing Recent Developments in the Recognition and Non-recognition of Governments" (2014) 108 American Journal of International Law at 214.

Besides, democratic outcomes are highly dependent on normative concepts that vary because there are fluctuation in the practices of democracy. A report from the 2017 Freedom House "Nations in Transits Report: The False Promise of Populism" shows that for the period ending 2017 more than 29 states had reported a decline in the practice of democracy, also 18 states scores on democracy drastically dropped.⁴⁹⁵

Finally, the effective control doctrine has undergone various state practices and can now be called an established principle of customary international law. As discussed in Chapter Three, the statehood approach for the recognition of a state cannot be met without the effective control doctrine. Likewise, military intervention by invitation to protect the sovereignty of a state from an armed attack cannot also occur without the effective control doctrine.⁴⁹⁶ Removing the effective control doctrine from the recognition of governments in international law would create a vacuum for these two international law principles. Moreover, the effective control doctrine has not been considered controversial under these principles to warrant replacement.

Given the above points, the effective control doctrine needs to continue to be maintained under international law and the recognition of governments because the removal of this doctrine could create more problems rather than the solution envisaged by the democratic legitimacy proponents. It is, therefore, necessary to revisit the recognition of governments controversies to determine whether there are validities in the claims against the effective control doctrine.

⁴⁹⁵ Freedom House, Nations in Transit Report: The False Promise of Populism (2017) <<https://freedomhouse.org/report/nations-transit/nations-transit-2017>> accessed on the 26 October 2019.

⁴⁹⁶ The concept of invitation is one of the non-Charter justifications by states for the use of force and intervention in the territory of another. Despite, the non-codification of this principle in international instruments, invitation as routinely finds its way into customary law. The concept of invitation deals with the issuing of a request from a lawfully recognised government who is in effective control of a state to another, permitting intervention and use of force on its territory to protect its sovereignty from armed attacks. See Davis R Robinson "Letter from The Legal Adviser, United States Department of State" (1984) 18 Int'lL. at 38 and James W Garner "Questions of International Law in The Spanish Civil War" (1937) 31(1) The American Journal of International Law at 67.

6.3. Recognition of Government Controversies Revisited: The Claims against the Effective Control Doctrine

A review of Chapter Two and Three of this study shows that there are limited valid claims against the effective control doctrine. It should be noted that the position of the author is not to assert the recognition of governments controversies are baseless or claim that the effective control doctrine is without problems. Instead, the author argues that these problems centre on the usefulness of recognition of governments, the structure of the recognition of governments itself or that some of the controversies are no longer valid or are limited.

For instance, the claims that some states have abandoned the practice of recognising governments and that the consequence of non-recognition on a government is limited. As such, the arguments that the functions of a recognised government should be performed by other apparatus such as diplomats and consular missions, centres on whether recognition of governments still serves any useful purpose rather than any drawback from the effective control doctrine.

Likewise, the point that recognition of governments is based on the discretionary decisions of states as a matter of their policy and political expediency rather than on international law rule.⁴⁹⁷ As such, states' decisions on recognition of government matters vary and often contain elements of inconsistencies. Further, it was argued that the inconsistency in state practice often results in the situation of a government being considered as constitutional by some states and deemed unconstitutional by others, thereby creating unnecessary confusion. A review of these debates demonstrates that the problem centres on the recognition of government structure rather than the effective control doctrine defects.

Similarly, some scholars claim that the political arbitrariness of many recognition decisions often results in problems and what makes this situation untenable is that an unrecognised government cannot sue or enforce judicial action on a deciding state if refused recognition. This point centres on the nature of recognition of government itself rather than the effective control doctrine.

⁴⁹⁷ Brad Roth "Whither Democratic Legitimism? Contextualizing Recent Developments in the Recognition and Non-recognition of Governments" (2014) 108 American Journal of International Law at 214.

Furthermore, the argument by some academics that the recognition of governments practice infringes on state autonomy by the denial of recognition to a government that has the necessary competence is premised on sovereignty violation and states actions, rather than the effective control doctrine itself.

The author does acknowledge the debates that the usefulness of recognition in curbing unconstitutionality has been defeated since an enquiry into the process by which a government originates is no longer tenable in international law. Also, the debate that the inability to analytically distinguish between the recognition of state and the recognition of government as subjects of international law raises questions as to what approach truly circumscribes the practice of recognition in international law as valid and centres on the effective control doctrine. The author rejects the continued insistence that the recognition of a government is a political rather than a legal matter and the ambiguous terminology issues in recognition is an effective control doctrine problem.

However, the author does acknowledge one valid primary argument against the effective control doctrine. This argument centres on claims that the effective control doctrine is antithetical to the "self-determination notion of the people's will" by overtly relying on the concept of "control" rather than popular acceptance as its main test. As a result, the doctrine is notorious for allowing unauthorised changes in government by the encouragement of revolutions and coups since the question of constitutionality is irrelevant to its application. Also, because the effective control relies on habitual obedience rather than consent of the governed. In consideration of this point, the next section examines whether there are other drawbacks to the effective control doctrine than the one discussed in this paragraph.

6.4. Identifying Other Effective Control Doctrine Drawbacks

In the previous section, the antithetical nature of the effective control doctrine to the self-determination of the people was identified as its very remaining drawback in recognition of government controversies. The objective of this section to identify whether other drawbacks need to be considered before modifying the current effective control doctrine. In so doing, this section comparatively examines the similarities and differences between the effective control doctrine and other recognition of government approaches discussed in Chapter Four of this study.

By comparing and contrasting the effective control doctrine with the other recognition of government approaches, the author can explore new hypotheses for the effective control doctrine. Also, a comparative analysis will help identify distinguishable characteristics of the other recognition of government approaches that need to be put into consideration when proposing new hypotheses for the effective control doctrine in the next section.

Also, it is important to note that the comparative analysis in this section is limited to the effective control doctrine and the other recognition of governments approach discussed in Chapter Four except the Genaro Estrada doctrine. The reason being that Chapter Two and Four of this study have extensively established that the Estrada proposal of abolishing the recognition of governments is not a solution. Instead, this section will be limited to study of the effective control doctrine, Carlos Tobar Doctrine, democratic legitimacy and Thomas Jefferson Approach.

6.4.1. Is there any Similarity between the Effective Control Doctrine and the other Recognition of Government Approaches?

A comparative assessment of the effective control doctrine and the other recognition of government approaches discussed in Chapter Four of demonstrates a similarity of objective. The similarity of objective is that the effective control doctrine and the other recognition of government approaches confer a certain degree of legitimacy on regimes. Under the effective control doctrine, the legitimate representative of the state is the one who is in effective control of the state, similarly, under the Carlos Tobar doctrine, the legitimate government of the state is the authority that is constitutionally elected. Both the Thomas Jefferson approach and the Democratic legitimacy approach also confer a similar degree of legitimacy by ensuring that the legitimate representative of the state that deserves recognition, is the government that is substantially the will of the people. Furthermore, the effective control doctrine and the other recognition of government approaches are aimed at the elimination or reduction of the recognition of governments controversies. In other words, the primary function of all the recognition of government approaches developed from the sixteenth century to date centres on legitimacy confirmation and the eradication of the controversies affecting the recognition of governments in international law.

Another similarity identified in all of the recognition of government approaches is deficits in the definition of terms; this problem is not just the problem of the effective control doctrine alone. An in-depth study of democratic legitimacy and other recognition of government approaches also reveals this same problem as an issue. For instance, the effective control doctrine lacks a definition in terms of what "effective and control" entail, similarly democratic legitimacy requirement, i.e. democracy, lacks clarity in meaning and what it involves. This same problem can be identified in Thomas Jefferson Approach and Carlos Tobar Doctrine and has been discussed under the unsuitability of each doctrine for the recognition of governments in Chapter Four.

Similarity in practices was another identification made with all recognition of government approaches. The effective control doctrine has been in operation since the sixteenth century and was adopted by states for more than 150 years until the recent arrival of democratic legitimacy that is challenging its usage. Similarly, the Thomas Jefferson approach emerged in the seventeenth century and was adopted by states for 114 years (1793-1907) until it was challenged and replaced by Carlos Tobar doctrine. Similarly, the Carlos Tobar doctrine which originated in the nineteenth century (1907) was adopted by some states for some decades and was used interchangeably with the effective control until 1992 when democratic legitimacy came into force. At present, the democratic legitimacy which originated in 1992 is concurrently applied interchangeably with the effective control and has been in used by states for the past 27 years (1992 till date).

Finally, the effective control doctrine and all other recognition of government approaches are enshrined in international instruments. The effective control doctrine is enshrined in Article 2(4) of the United Nations Charter, and Hague Convention (IV) respecting the Laws and Customs of War on Land (annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land; 205 CTS 277).⁴⁹⁸ Similarly, the Thomas Jefferson approach is enshrined as self-determination rights in

⁴⁹⁸ Hague Convention (IV) respecting the Laws and Customs of War on Land, opened for signature 18 October 1907 (entered into force 26 January 1910) annex (Regulations respecting the Laws and Customs of War on Land') S3.

Article 1(1) of the ICCPR,⁴⁹⁹ and democratic legitimacy in Article 21 of the UDHR while Carlos Tobar doctrine protects the rule of law which is enshrined in the domestic constitution of each state and can be identified in international conventions such as Article 5 of the Lome Convention IV.

It can be, thus, concluded from the discussion on the similarities between the effective control doctrine and the other recognition of government approaches that they all have a historical pedigree, similarity of objective, similarity of purpose, similarity of adoption having undergone states practices. Therefore, it makes sense to draw a comparison between them.

6.4.2. Is there any Disparity Between the Effective Control Doctrine and Other Recognition of Government Approaches?

Having established that there is a similarity between the effective control doctrine and the other recognition of governments approaches, this section examines the disparities between the approach.

There is not much disparity between the effective control doctrine, and the other recognition of government approaches at a first review. However, a close look demonstrates that all the approaches have a rebuttable presumption of consent except the effective control doctrine. For example, in Thomas Jefferson approach, the presumption of consent is derived from the popular will of the people. Likewise, Carlos Tobar Doctrine and democratic legitimacy approach presumption of consent are individually deriving from constitutions and democracy, respectively. However, a critical review of the effective control doctrine does not reflect any of these findings. Although, there is the presence of habitual obedience and a connection with some international law principles identified with the effective control doctrine. There is, however, no evidence of rebuttable presumption of consent. The habitual obedience identified in its definition of terms signifies submission and not consent. The next section will discuss a way to address this problem.

6.5. Comparative Study Discussion: Towards an Effective Approach

A comparative study of the effective control doctrine with the other recognition of government approaches helped identify four characteristics in the approaches, which

⁴⁹⁹ This reflects Article 1 of the ICESCR states that "all people have the right to self-determination".

are namely similarity of objective; similarity in historic pedigree; similarity of adoption and similarity in been enshrined in international instruments. However, when comparing the disparity of the effective control doctrine, only one disparity could be identified in forms of lack of a rebuttable presumption of consent. Given this information, the author concludes that though the effective control doctrine is the oldest, substantially dominant approach to the recognition of governments in international law, the lack of a rebuttable presumption of consent makes it less problematic.

Therefore, a solution to the effective control doctrine deficit is the removal of habitual obedience and the addition of a rebuttable presumption of consent determined by the *acceptance of the population* to the factors that determine the effective control doctrine efficacy. In so doing the effective control doctrine could maintain its status as well as become the best solution, and most sustainable approach for the recognition of governments in international law. The reason for this suggestion follow.

Firstly, a modified effective control doctrine with a rebuttable presumption of consent projects a recognition of government approach that dogmatically presents itself with the promotion of the self-determination of the people and regime constitutionality. In effect, the international values that are currently lacking under the effective control doctrine are protected, and the vulnerability of the effective control which exposes it to replacement as a result of its political character would be eliminated. Additionally, the effective control would easily be consolidated by states having derived connectivity in enshrined principle of international law (self-determination) that are embodied in international law instruments.

Secondly, with a rebuttable presumption of consent as an additional factor to the effective control doctrine, it will not only but also equalise the doctrine with factors that makes democratic legitimacy a better solution. It will surpass and replace democratic legitimacy due to its other commendable factors such as being the only recognition of government approach that fills the inherent void that occurs after the

decentralisation of a constitutional order such as a coup.⁵⁰⁰ It would also transfer popular consent into governance. At minimum, citizens would be able to effectuate legitimacy after an undemocratic change by either consenting to governance or rebutting governance. For example, in 2011, Egyptian's from different backgrounds including Islamists, Liberals, anti-capitalists, nationalists and feminists took to the street demanding the overthrow of Egyptian president Hosni Mubarak. After 18 days of protest showing that despite the authoritarian president in effective control of Egypt, consent had beyond doubts been rebutted by the populace, Vice President Omar Suleiman announced the resignation of the president.⁵⁰¹ In 2012, Egypt was handed over to the military who were in temporary effective control of the state until mid-2012 (consent rebutted with demands for election), when the Muslim Brotherhood candidate, President Mohammed Morsi through democratic process became the President of Egypt.⁵⁰²

Thirdly, the current effective control doctrine lacks accountability and does not permit an enquiry into the actions of usurpers. By adding a rebuttable presumption of consent, the newly modified effective control doctrine would properly reflect accountability. Governments which come into power without their population acceptance will not be recognised despite being in effective control, and if recognise but abuse their population, their legitimacy and recognition can easily be withdrawn because consent to govern is rebuttable. For example, President Zine Al-Abidine Ben Ali lost his legitimacy and recognition in 2011, after Tunisians rebutted consent to be governed by him.⁵⁰³ President Ali had been in effective control of Tunisia since 1987 after he came into power by a bloodless coup where he deposed President Habib Bourguiba. The rebutting of consent had to do with poor economic

⁵⁰⁰ Brad Roth "Secessions, Coups and The International Rule of Law: Assessing the Decline of The Effective Control Doctrine" (2010) 11 *Melb. J. Int'l L.* at 395

⁵⁰¹ Egypt Revolution: 18 days of people power *Aljazeera Politics* <<https://www.aljazeera.com/indepth/inpictures/2016/01/egypt-revolution-160124191716737.html>> accessed on the 10 November 2019.

⁵⁰² Julia Elyachar and Jessica Winegar Revolution and Counter-Revolution in Egypt a Year after January 25th *Society for cultural Anthropology* <<https://culanth.org/fieldsights/series/revolution-and-counter-revolution-in-egypt-a-year-after-january-25th>> accessed on 17 November 2019.

⁵⁰³ Adam Bernstein Zine el-Abidine Ben Ali, Tunisian despot whose ouster helped spark Arab Spring, dies at 83 *Washington Post* <https://www.washingtonpost.com/local/obituaries/zine-el-abidine-ben-ali-tunisian-despot-whose-ouster-helped-spark-arab-spring-dies-at-83/2019/09/19/a0b3825e-77c9-11e7-8839-ec48ec4cae25_story.html>

development, failure to input democratic processes and failure to observe international standards of political rights.⁵⁰⁴

Fourthly, a rebuttable presumption of consent ensures that the burden of proof is on the government that effects a regime change or alters an established constitutional order. Also, it exposes the rationale behind a conflict and uncover which conflicts is of legitimate concerns, which is democratic, and which are pretentious or with ulterior motives. A government which continues or intends to alter a constitutional structure must provide strong reasons to the population. For instance, the Boko haram insurgents in Nigeria are in effective control of the Northern parts of Nigeria but have been unable to prove that they are in control and accepted by the Nigerian population to deserve recognition. Similarly, in Libya, Gaddafi at a point, despite being in effective control of Libya was unable to show that he was accepted by majority of Libya's population during the revolt.

Finally, since, the Arab Spring, the international community has witnessed a surge in internal armed conflicts taking place across the globe in what is now refer to as democratic revolution.⁵⁰⁵ This global trend has culminated in post-Cold War internal conflict in some Arabs and African states which has resulted in tremendous loss of lives and human rights violations.⁵⁰⁶ In numerous instance, these internal armed conflicts have prompted recognition from states as a result of humanitarian needs or to promote international security and peace.⁵⁰⁷ Between year 2000 to 2018 the UCDP/PRIO Armed Conflict Dataset had recorded a high surge in internal armed conflict where forcible intervention on behalf of a government, opposition or oppositions groups were recorded, and recognition took place due to such intervention.⁵⁰⁸ As provided by international law, most of these forcible interventions

⁵⁰⁴ Paul Delaney Senile Bourguiba Described in Tunis *The New York Times*

<<https://www.nytimes.com/1987/11/09/world/senile-bourguiba-described-in-tunis.html?scp=2&sq=senile%20bourguiba&st=cseSenile>> accessed on the 18 November 2019.

⁵⁰⁵ Kalkidan Obse "The Arab Spring and The Question of Legality Of Democratic Revolution In Theory And Practice: A Perspective Based On The African Union Normative Framework" (2014) 27 *Leiden Journal of International Law* at 817-838.

⁵⁰⁶ Maurice Ogonnaya "Arab Spring in Tunisia, Egypt and Libya: A comparative analysis of causes and determinants" (2013) 12 *Alternatives: Turkish Journal of International Relations* at 4-16.

⁵⁰⁷ An example is the political recognition of Syria opposition.

⁵⁰⁸ *UCDP/PRIO Armed Conflict Dataset* (New Version), Peace Research Institute Oslo, Available At <<http://www.prio.no/CSCW/>> accessed on the 14 November 2019.

have to occur by explicit or implicit consent of the warring faction that is in effective control of the state thus giving rise to the need for recognition. As discussed in Chapter Four, the general rule of international law had always been that whoever can show evidence of control, efficacy and command the habitual obedience of the state is the lawful holder of authority in such circumstance can call for military intervention.⁵⁰⁹ However, this serves as the greatest flaw against the effective control doctrine because commanding the habitual obedience of the population in such circumstance is tantamount to coercion rather than choice (self-determination will). With these, the values of international law in relation to self-determination rights of citizens, freedom of expression and participatory political rights enshrined in the UDHR, and the ICCPR are not reflected. However, with a rebuttable presumption of consent, the tacit consent of the governor is evidential as opposed to habitual obedience under the effective control doctrine which represents control and command.

6.6. Rebuttable Presumption: A *Prima Facie* Case of Consent

A question that may arise with the use of the modified effective control doctrine just like every other recognition of government approach is what form of evidence would determine a rebuttable presumption of consent and when consent can be rebuttable.

Ultimately, a rebutted presumption means that consent to lead has been withdrawn and a regime changes would be effectuated. Therefore, the decisive test for consent could be populace acceptance, and the withdrawal of consent could be determined by popular revolt. It is, therefore, necessary for states to have internal procedures and structure in their constitution for the process of transition should consent be rebutted.

In the long term, it would help eliminate pro-democratic intervention and the problems of pre-mature recognition. In case of spontaneous regime change, a similar procedure like Egypt where the President resigned impromptu and handed over to the military who effected democratic elections could be sufficient. However, instead of a military regime, a state constitution or treaty should provide for a more

⁵⁰⁹ David Wippman "Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict" (1995) 27 Colum. Hum. Rts. L. Rev. at 435.

diplomatic and appropriate transition process that will promote the self-determination rights of the governed to choose their government in any way and process they prefer.

6.7. Rebuttable Presumption of Consent: Libya Revisited

This section explains how a modified effective control doctrine would create better outcomes than what is presently available by re-examining Libya conflict of 2011. It should be noted that Libya has been revisited in this section because it is the only state at present that has undergone all recognition circumstances.

6.7.1. Forcible Overthrow of An Existing Government: The Negative Effect

Libya, formerly known as the independent United Kingdom of Libya or Jamahiriya rests between three peripheries - Arab, Africa, and the Mediterranean.⁵¹⁰ More than ninety per cent of the state surface is inhabitable for agriculture and human settlement, despite the country being one of the largest in Africa with over 6 million population.⁵¹¹ Libya's population is a mixture of Arabs, and the Berbers, who are the original indigenous settlers of Libya.⁵¹² Libya has the largest known oil reserve in Africa⁵¹³ and is known as the major exporter of petroleum. As such the word Libya in Africa is synonymous with Oil.⁵¹⁴

Libya became an independent entity in 1951 under the established monarchy of Sayyid Muhammad Idris al-Mahdi al-Sanusi until 1969, when Qaddafi became the president of Libya after a successful bloodless coup d' etat against the Monarchy.⁵¹⁵ Qaddafi's government ruled and retained control of Libya as its sole legitimate government for forty-five years until early February 2011 when the democratic uprising began, which led to the de-recognition and death of Qaddafi.

The negative effects of the old effective control doctrine became obvious after

⁵¹⁰ Richard Phelps "Ronald Bruce St John, Libya: From Colony to Revolution" 2012 17(4) The Journal of North African Studies AT 724-25.

⁵¹¹ Ethan Daniel Chorin *Exit the Colonel: The Hidden History of the Libyan Revolution* (Public Affairs, 2012) at 13.

⁵¹² Kimberly L Sullivan *Muammar Al-Qaddafi's Libya* (Twenty-First Century Books, 2008) at 13-6.

⁵¹³ Sam Halabi "Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context" (2012) 27 American University International Law Review at 378.

⁵¹⁴ Ethan Daniel Chorin *Exit the Colonel: The Hidden History of the Libyan Revolution* (Public Affairs, 2012) AT 13.

⁵¹⁵ Sean Lynch "Invitation to Meddle: The International Community's Intervention in Libya and the Doctrine of Intervention by Invitation, An" 2011 2 Creighton Int'l & Comp. LJ 173 at 175

the coup because Qaddafi needed to maintain control and habitual obedience rather than the consent of the governed for him to retain power. To command full habitual obedience, Qaddafi eliminated parliamentary democracy and political parties.⁵¹⁶ In replacement of democratisation, Gaddafi developed a form of democracy termed “Direct Democracy” which according to him relied on popular congresses and committees as substitutes for election participation.⁵¹⁷ The application of the direct democracy led to the change of Libya's name to the Socialist People's Libyan Arab Jamahiriya, which neologism translates to “state of the Masses.”⁵¹⁸ Qaddafi's new political system relied on powers deceptively being enshrined in the people through tightly controlled revolutionary committees who were not independently elected by the people.⁵¹⁹

As a result, Qaddafi was able to maintain full control of Libya by the suppression of the popular will of Libyans through the bugging of telephones and telex of Libyans in need to caution their activities. Libyans lived in fear of the government and were subdued from expressing their independent views against the government. Davis asserted that:⁵²⁰

In addition to carrying out secret executions, the Qaddafi regime sought to terrorise the populace through the frequently televised hanging of dissidents. Beyond overt brutality, the government forbade unauthorised gatherings in order to deprive Libyans of the opportunity to congregate outside government supervision.

Also, unreasonable restrictions were made on the membership of the Arab Socialist Union, which was the only political party in Libya.⁵²¹ Not only was membership in the political party restricted to specific work categories, but, the participatory rights of Libyans in the political structure and development of their

⁵¹⁶ Brian Lee Davis *Qaddafi, Terrorism, and The Origins of the US Attack on Libya* (ABC-CLIO, 1990) at 2-3.

⁵¹⁷ John Wright *Libya: A Modern History* (Taylor & Francis, 1981) at 19.

⁵¹⁸ Brian Lee Davis *Qaddafi, Terrorism, and The Origins of the US Attack on Libya* (ABC-CLIO, 1990) at 2-3.

⁵¹⁹ The new system described by Qaddafi as democracy was a classic example of the leftist regime device of highly elaborate “orchestrated political participation that provides mechanism of social control and produces the illusion of popular support All Libyan were supposed to participate in “basic people's congress, which featured speeches, endlessly repetitive chant of slogans and waving of fists (this resulted in a condition called Qaddafi arms) and circumspect debate and voting show by hand. Delegates from these and various other congresses ...deliberations were tightly controlled.” See Brian Lee Davis *Qaddafi, Terrorism, and The Origins of the US Attack on Libya* (ABC-CLIO, 1990) at 2-3.

⁵²⁰ John Wright *Libya: A Modern History* (Taylor & Francis, 1981) at 194.

⁵²¹ Kimberly L Sullivan *Muammar Al-Qaddafi's Libya* (Twenty-First Century Books, 2008) at 32.

society were systematically control in such a way that parliamentary participation and representations was dependent on the government selected revolutionary committees who report directly to Qaddafi.⁵²² The effect of this was that political participation and freedom of expressions were centralised on the representatives rather than the people.⁵²³ Libyans lacked the political freedom to express their will undiluted and participate fully in given areas relating to the sovereignty of Libya.

As discussed earlier, self-determination, freedom of expression and participatory rights are international law principles that are enshrined in the UDHR and ICCPR. By the content of these instruments, every Libyan has a right to determine their political status and freely choose their government and express themselves. However, the current effective control does not permit because the consent of the governed is missing in its legitimacy requirement and governments who come into power under the doctrine are mostly authoritarian in need to continuously maintain efficacy, control and command habitual obedience. However, with the modified doctrine of a rebuttable presumption of consent, the pressure to maintain control and command habitual obedience is eliminated. In replacement, the self-determination rights, freedom of expression and participatory rights of citizen are promoted, and recognised government are caution that consent is rebuttable.

6.7.2. Accession to Power of a New Government by a Procedure not Provided for By the Constitution of a State: Rebutted Consent

In 2011, Libyans effected a regime change by a process contrary to Libya's constitution and Qaddafi democracy model for power accession. Ultimately, Qaddafi underestimated the regime change in Libya when the revolt against his government began because he felt the Libya security system (military and police force) would be able to handle the revolt. Qaddafi even referred to the insurgents as cockroaches, whose regime change decisions needs to be purified, having believed that he could be able to achieve habitual obedience since he was in effective control of majority

⁵²² Active social forces within the state “who are eighteen years of age, in good legal standing, of sound mental health, and not a member of the former royal family or associated with the defunct monarchical government were the only welcome member. See, Helen Chapin Metz, ed. *Libya: A Country Study*. Washington: GPO *Library of Congress* 03 Mar. 2016 < <http://countrystudies.us/libya/>>

⁵²³ Kimberly L Sullivan *Muammar Al-Qaddafi's Libya* (Twenty-First Century Books, 2008) at 32.

parts of Libya.⁵²⁴ However, he underestimated the internal armed conflicts, the NTC were prematurely recognised and NATO intervention did take place. Two issues were on grounds before the NATO intervention in Libya. On one part, Qaddafi was in effective control but lacked the habitual obedience to maintain full control. On the other, the NTC had habitual obedience of Libyans but lacked the machinery to effect full control of Libya until NATO and some states military Interventions.⁵²⁵

However, this situation could have been avoided had the rebuttable presumption of consent instead of habitual obedience as the main test of the effective control doctrine. Qaddafi could have handed over in a similar style as Egypt (2013) instead of continuing the conflict with the hope of submerging the revolts and commanding obedience. Also, the violation of laws of War by the premature recognition of the NTC, and military intervention in the armed conflict could have been avoided. Till date, Libya has not been able to recover from the intervention.

Had the new modified effective control doctrine been in operation during the Libyan conflict, the overthrow of Qaddafi by the NTC without assistance could have resulted in a similar regime change like the Sudanese revolution of 2019 that resulted in the deposition of President Omar al-Bashir after thirty years in power. The current unnecessary interference and political instability in Libya could have been avoided. Sudan is today more prosperous and stable than Libya because the Sudanese were able to choose their government and rebut consent to be governed without third party interference.

6.8. Conclusion

The blur relationship between the effective control doctrine and other recognition of government approaches arose from the lack of rebuttable presumption of consent thereby projecting the effective control doctrine is antithetical to the self-determination of the people. The addition of this new factor to the current effective control doctrine would to a considerable length attributes a moral dimension to the effective control doctrine. Also, it would dissuade unconstitutional regime changes

⁵²⁴ Alex J Bellamy "Libya and The Responsibility to Protect: The Exception and The Norm" (2011) 25 *Ethics & International Affairs* at 265.

⁵²⁵ Ulfstein, Geir, and Hege Føsum Christiansen "The legality of the NATO bombing in Libya" (2013) 62 *International & Comparative Law Quarterly* at 159-171.

because oppositions intending to destabilise a constitutional order would now be aware that the absence of a consent by the population would mean their regime changes would not be regarded. Besides, *burden of proof* will now rest on any regime or oppositions who tries to alter the constitutional structure of a state to assert that the state population want the regime to not only influence a change but want to be governed by it. In the long term, this would dissuade coups and revolutions that are backed with political intolerance and hidden agendas.

Justification for this assertion arose from the demerits of having democratic legitimacy as a replacement approach. Particularly, in recent times, where, there hasn't been any recognition of governments policy to say non-democratic governments are illegitimate nor that the non-democratic character or origin of a government makes it an unconstitutional regime.⁵²⁶ Since the fourth wave of democracy (Arab Spring) what we have witnessed is silence.⁵²⁷ The European Union democratic conditionality on African states is being challenged and abandoned.⁵²⁸ Democratic origin of governments has been de-emphasised and as at the time of completing this writing democratic legitimacy has been under attack by the same international legal scholarship that gave it a platform due to scepticism on the end product of democratic legitimacy.⁵²⁹ The need to swiftly re-access and modify the effective control doctrine to meet current recognition of government demands as done in this Chapter, rather than replace it, with democratic legitimacy is, therefore, crucial.

⁵²⁶ Jean d'Aspremont "1989-2010: The Rise and Fall of Democratic Governance in International Law" (2010) 3 *Select proceedings of the European Society of International Law* at 5. In the same vein, G H Fox "Election Monitoring: The International Legal Setting" (2001) 19 *Wisconsin International Law Journal* 295, 312. Christian Pippan "International Law, Domestic Political Orders, and the Democratic Imperative" at 34-35. This finding has led some authors to contend that there exist "doubles standards" in that regard. See M G Kohen "La création d'Etats en droit international contemporain" (2002) 6 *Cours euro-méditerranéens Bancaja de droit international* at 619.

⁵²⁷ As in Egypt, Libya and Zimbabwe.

⁵²⁸ Thomas Carothers "The Backlash Against Democracy Promotion" (2006) 85 *Foreign Affairs* at 55.

⁵²⁹ Jean D'Aspremont "1989-2010: The Rise and Fall of Democratic Governance in International Law" (2010) 3 *Select proceedings of the European Society of International Law* 3 at 10.

Chapter Seven: Conclusions, Implications, Challenges and Future Directions

7.1. Introduction

This research was undertaken to address two matters. The first was to investigate the claims that democratic legitimacy is a solution to the recognition of government controversies. The second was to establish whether democratic legitimacy could indeed be a suitable replacement of the current recognition of government approach, the effective control doctrine.

To achieve the study aims, after the presentation of an introduction (Chapter One), this study examined the rationale behind the recognition of governments, and the debates whether the recognition of government still serves any purpose in international law for it to be maintained (Chapter Two).

In contrast to academics who claim that recognition of governments has outlived its purpose in international law, this study argues that it should be maintained and is essential to both international law and states. As evidence, the merits of recognition of governments which includes facilitation of international relations, protection of state sovereignty, and promotion of political stability were examined, and the impact of non-recognition was discussed (Chapter Two).

An in-depth analysis as to why the recognition of governments is controversial from three additional perspectives to those discussed in Chapter Two was examined in Chapter Three. It was concluded that the lack of an objective approach is one of the primary causes of the problems affecting recognition of governments in international law (Chapter Three).

To address the question of what approach can best be applied to the recognition of governments, Chapter Four reviewed five approaches that were developed from the Sixteenth century until today to address the recognition of governments problem. The Chapter focused on the successes of these approaches but mainly the reasons why they failed in order to glean lessons from them.

Using a comparative analysis and case study approach, Chapter Five established democratic legitimacy as a better solution than the effective control doctrine but not a sustainable replacement of the effective control doctrine. Several justifications were from the lack of the definition of democracy to non-practise of democracy to its absolute core were discussed as the reasons for this claim.

Inferences drawn from Chapter Five led to the formulation of a modified effective control doctrine as the best and most sustainable solution to the recognition of government controversies (Chapter Six).

This current Chapter is divided into seven sections. The second section contains an overview of the research findings. The third section highlights the contribution made by this study to the current body of Literature. The fourth section discusses the future direction of this study. The fifth section discusses the challenges faced in this study of finding a solution to the recognition of government controversies. The sixth section demonstrates the study solution in the ongoing Libya conflict, and the seventh section concludes this study.

7.2. Research Findings

Recognition of governments is one of the essential components of governance that play a crucial role in the security, political stability and socio-economic advancement of a state. Despite this, recognition of governments is one of the most challenging and murkiest topics of international law with many controversies. Recently, some academics believe that the use of a new approach that centres on the application of democracy to determine the most suitable qualified holder of authority in a state would solve the recognition of government controversies. Also, they claim that the new approach has arrived in international law to displace the effective control doctrine, which was formerly the most dominant recognition of government approach.

This study examines the democratic legitimacy claims and investigates the extent to which the new approach (democratic legitimacy) could be the best and sustainable solution to the recognition of government controversies. The findings of this study are as follows:

7.2.1. Recognition of Governments Debates

The debates surrounding whether the recognition of government serves any useful purpose in international law lead to an investigation of the problems affecting the recognition of governments in international law and the usefulness of recognition of governments to states. This study identified five useful reasons for the recognition of governments in international law, namely: confirmation of a regime status;

conferment of legal personality; promotion of political stability; determent of unconstitutionality and the protection of state sovereignty. Also, the study identified that the non-recognition of government has significant impact on a state such that an unrecognised government is unable to integrate into international society nor request mutual assistances that would ordinarily be easy for a recognised government.

Having concluded from the study findings that the recognition of government serves useful purposes, the study examined the debates against the recognition of governments. The examination resulted in the identification of eight debates against the recognition of governments. Also, findings in this study identified that most of the controversies centre on the structure and modes of recognition rather than the recognition of government approaches which most studies concentrated upon. Also, it was identified that some of the controversies are no longer valid or are limited in claims as a result of state practices.

Also, the study identified the main disparity between the effective control doctrine and all the other recognition of government approaches that have been introduced by states to address some of the recognition of government problems. The disparity centres on the effective control doctrine lacking a provision relating to the consent of the governed. Instead, habitual obedience which signifies command and at times coercion was identified in the effective control doctrine. In effect, it was discovered that the current practice of the effective control doctrine promotes unconstitutional regime changes, lack of accountability, and is antithetical to the self-determination of the people. As such, a modification of the doctrine is necessary for it to continue as recognition of government approach.

7.2.2. Democratic Legitimacy

Democratic Legitimacy arrived into the recognition of government practices as a result of an agreement that was signed in 1991 by the Latin American states under the aegis of Organisation of American States (OAS) in Santiago, Chile.⁵³⁰ The agreement was named *Santiago Commitment to Democracy and The Renewal of the Inter-American System* and consisted of various agreements affirming democracy as

⁵³⁰ Roland I Perusse *Haitian Democracy Restored, 1991-1995* (University Press of America, 1995) at 21.

a state priority and the only statutory instrument for the precise manifestation of the people's will.⁵³¹

Earliest documented evidence of democratic legitimacy in state practices point to the 1992 pro-democratic intervention in Haiti, where the OAS Council met and invoked resolution 1080 of the Santiago document denouncing Haiti coup and demanding the respect for the democratic administration of Haiti.⁵³² The resolution also, provided for the use of any necessary measure that would result in the reinstatement of the democratic candidacy of Haiti President. The second collective state practice which evidences the promotion of democratic legitimacy occurred the same year of the Haiti coup when the Communist Party of the Soviet Union (CPSU) attempted a coup to oust the President of the Soviet Union, Mikhail Gorbachev. However, the coup (known as August Putsch) failed on its third day as a result of alignments against the coup by state leaders in defence of democracy.⁵³³

The OAS agreement and numerous pro-democratic interventions that occurred in 1992 led a renowned United States academic, Thomas Franck to believe that a new approach for validating government had arrived in recognition of government practice. According to Franck, "inestimable human, political and historical import that demonstrates for those sensitive to trends that democracy is

⁵³¹AG/Res.1080 (XX1-0/91) (5TH Plen.Sess., June 5, 1991). Resolution 1080 specifically stated that To instruct the Secretary General on the immediate convocation of a meeting of the Permanent Council in the events of any occurrences giving rise to the sudden or irregular interruption of the democratic political, institutional process of the legitimate exercise of power by the democratically elected government in any organisation's member states. Within the framework of the charter, to examine the situation, decide on and convene an ad-hoc meeting of the ministers of foreign affairs or a special session of the General Assembly, all of which must take place within a ten-day period

⁵³² The resolution state "To recognise the representative of the Government of President Jean-Bertrand Aristide as the only legitimate representative of the Government of Haiti to the organs, agencies and entities of the inter-American system. To recommend, with due respect to the policy of each member states on the recognition of states and governments, action to bring about the diplomatic isolation of those who hold power illegally in Haiti. To recommend to all states that they suspend their economic, financial, and commercial ties with Haiti and any aid and technical cooperation except that provided for strictly humanitarian purposes. Importantly, it affirmed, to adopt, in accordance with the OAS Charter and international law, any additional measures that may be necessary and appropriate to ensure the immediate reinstatement of President Jean-Bertrand Aristide to the exercise of his legitimate authority. See CP/RES.567 (870/91

⁵³³ Thomas Franck "The Emerging Right to Democratic Governance" (1992) 86 The American Journal of International Law at 74.

beginning to be seen as the *sine qua non*⁵³⁴ for validating governance.”⁵³⁵ Franck published an article to support his claims, and this was soon supported by numerous academics that a new recognition of government approach had arrived as a solution to address some of the recognition of government controversies and would be a sustainable replacement of effective control doctrine. However, more recently, some academics in Bahrain,⁵³⁶ Canada,⁵³⁷ Europe,⁵³⁸ South Africa,⁵³⁹ and United States⁵⁴⁰ concluded that democratic legitimacy claims should be treated with caution.

A thorough investigation of the recognition of government approaches from the sixteenth century until today in this study indicates democratic legitimacy as the best approach to some, but not all of the recognition of government controversies. Furthermore, it was identified that democratic legitimacy promotes accountability by ensuring governments that come to power are based on citizens' will, which is expressed through electoral processes. Also, democratic legitimacy is connected to some international law norms such as human rights, self-determination and democracy.

Also, this study identified that democratic legitimacy is embodied in international law instruments such as UDHR and ICCPR, thus ensuring that sovereignty belongs to the governed and democratic rights are guaranteed. Some other inherent advantages of democratic legitimacy were identified. For example, it was noted that democratic legitimacy had been a conditionality for some state relations,⁵⁴¹ states have practised it for twenty-seven years, it is being consolidated

⁵³⁴ *sine qua non* refers to the main reason

⁵³⁵ Thomas M Franck "The Emerging Right to Democratic Governance" (1992) 86 *The American Journal of International Law* at 89.

⁵³⁶ Alfhadhel, Khalifa "Toward an Instrumental Right to Democracy" (2018) 112 *AJIL Unbound* at 84-88.

⁵³⁷ Obiora Chinedu Okafor "Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet." (2014) 108 *AJIL Unbound* at 228-232.

⁵³⁸ Jean Aspremont "The Rise and Fall of Democratic Governance in International Law: A reply to Susan Marks" (2011) 22(2) *European Journal of International Law* at 549-570, Jure Vidmar "Democratic Legitimacy between Port-au-Prince and Cairo: A Reply to Erika de Wet" (2014) 108 *AJIL Unbound* at 208-212. Susan Marks "What has Become of the Emerging Right to Democratic Governance?" (2011) 22(2) *European Journal of International Law* at 549-570

⁵³⁹ Erika De Wet "From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition" (2014) 108 *American Journal of International Law*.

⁵⁴⁰ Brad Roth "Whither Democratic Legitimism? Contextualizing Recent Developments in the Recognition and Non-recognition of Governments" (2014) 108 *AJIL Unbound* at 213-218. Gregory Fox and Brad R. Roth "The Dual Lives of "The Emerging Right to Democratic Governance" (2018) 112 *AJIL Unbound* 112 at 67-72.

⁵⁴¹ Rich Roland "Bringing democracy into international law" (2001) 12 *Journal of Democracy* at 29-30.

which makes it easily implementable and enforceable. Thus, it is reasonable based on inherent advantages to consider democratic legitimacy as the best recognition of government of approach among the other existing approaches.

Several serious drawbacks were however identified in respect of the application, operation and usages of democratic legitimacy which caused the author of this study to have a rethink in the conclusion that democratic legitimacy is the solution to put the recognition of government controversies to rest. For example, democratic legitimacy by itself cannot guarantee a solution to all the recognition of government controversies because there is a high level of inconsistency in state practice concerning pro-democratic interventions. Besides, there has not been any consolidated accepted global-level international rule or the presence of a similar policy to that of the OAS in international law against the recognition of undemocratically installed government.

Furthermore, the critical elements of democratic legitimacy for the recognition of governments is electoral processes. However, a serious threat to it is electoral intolerance. Also, different amorphous policies to quantify the definition of democracy, which is the most crucial factor of democracy, makes it a less desirable and sustainable approach.

7.2.3. The Effective Control Doctrine

For the above reasons, the effective control doctrine was revisited. A positive and significant finding was the discovery that if the effective control doctrine is modified it would serve as a better and sustainable solution than democratic legitimacy. Justification for this was the similarity discovered between the effective control doctrine and democratic legitimacy (Chapter Five), and some other added advantages of the effective control doctrine (Chapter Six). For instance, it was identified that the effective control doctrine plays a significant role in the identification of the better-placed faction to recognise after the decentralisation of a state's constitutional order in circumstances such as coup d'état or revolution. Also, the effective control doctrine was identified as a significant promoter of autonomy, which is a strong advantage that is lacking in all other recognition of government approaches.

Additionally, given that the effective control doctrine has been in operation since the Westphalian period, it is linked to other international law principles such as

the recognition of states and military intervention by invitation. Thus, the removal of the effective control doctrine would create unnecessary enquiry into processes of some of these other international law principles such as intervention by invitation.

This study also identifies that the effective control doctrine serves the broader goal of inhibiting intervention by promoting autonomy and peace among states. However, it was identified that the effective control doctrine has a significant drawback such as the absences of consent. Based on this finding, the study concludes that the effective control doctrine plays a vital role in recognition of government practices, as such it should be modified to meet current recognition of government demands rather than being replaced.

7.2.4. Solutions Advanced by Academics

In recent years, democratic legitimacy as a suitable and sustainable replacement of the effective control doctrine has received the attention of some academics. However, it remains a controversial discourse because academics are at variances as to whether the international system should settle on more modest alterations of the effective control doctrine, or whether alternatively, a solution would be provided through democratic legitimacy. The following are the views of some academics concerning the effective control doctrine, democratic legitimacy and other suggested solutions to the recognition of government across the globe.

In 2018, an eminent constitutional law academic, Roberto Gargarella, argued for the amendment of democratic legitimacy using deliberative democracy, a process by which collective dialogue and discussion would replace elections or majority rule as the current democratic legitimacy practice. Justifying his recommendation, Gargarella provided example in the Inter-American Court of Human Rights claim that democracy cannot be perfectly realised without deliberation using the Uruguay case of *Gelman v Uruguay*.⁵⁴² However, the author of this study argues against Gargarella's claim on the basis that a deliberative democracy requires cross-multi engagements and deliberations which are not always readily available in some recognition circumstances that are beset with multiple ideologies and factions. Furthermore,

⁵⁴² Roberto Gargarella "Democracy's Demands" (2018) 112 *AJIL Unbound* 112 at 76, See also, *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 221 (Feb. 24, 2011).

deliberative democracy would require capacity building, consultations and training that needs to be directed towards citizens who are the primary decision-maker in a democratic society. However, some recognition circumstances such as revolution and coups make this unachievable.

Another academic, Professor Bojan Bugaric at the University of Ljubljana claimed that the current global democratic recession has undermined democratic legitimacy practices. As such, the survival of democratic legitimacy would be dependent on constitutional democracy and the availability of a democratic institution.⁵⁴³ Bugaric, claimed that a constitutional democracy with an institution putting checks and balances to democratic action would be a solution to the current democratic legitimacy drawback. However, the problems with Bugaric's argument is the lack of a constitutional paradigm when the recognition of government matters arises. In addition, not all states are democratic or practice a democratic form of governance.

Concerning the effective control doctrine, a Professor of International Law at the University of Pretoria, Erika de Wet claimed that although the "might is right" factor raises concerns with the effective control doctrine, the effective control doctrine should not be replaced.⁵⁴⁴ Justifying her claims, Professor De Wet relied on the absence of a customary obligation to withhold recognition from government with unconstitutional origins and the lack of a definitive trajectory in state practices. While the author partially supports Professor de Wet's claims, the lack of self-determination rights which is projectable through a rebuttable presumption of consent remains the most significant flaw of the effective control doctrine.

Professor Brad Roth from Wayne State University argued for an effective control doctrine with internal processes and popular sovereignty as a solution.⁵⁴⁵ According to Professor Roth, the presence of popular sovereignty in the internal process of the effective control doctrine would result in a strong presumption in

⁵⁴³ Bojan Bugaric "The Right to Democracy in a Populist Era" (2018) 112 *AJIL Unbound* 112 at 79-83.

⁵⁴⁴ Erika De Wet "From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition" (2014) 108 *AJIL Unbound* at 205 to 207.

⁵⁴⁵ Brad Roth "Whither Democratic Legitimism? Contextualizing Recent Developments in the Recognition and Non-recognition of Governments" 2014 108 *American Journal of International Law* at 214 to 218.

favour of established patterns of rule, and an absence would indicate repudiation. For Professor Roth, an effective control doctrine that is enshrined in internal processes grounds a rebuttable presumption, such that the recognition standing of a government can still be denied if such governments lack plausibility to represent the community effectively. The author of this study agrees with Professor Roth's claims.

Other than democratic legitimacy and the effective control doctrine, some other approaches were postulated by some academics. For example, Professor Jure Vidmar of University of Oxford argued for a human rights approach as the basis of recognition of government international law. Relying on the failure of the Security Council to recognise the Taliban government in Afghanistan (2001) and the de-recognition of Gaddafi based on human rights considerations, Vidmar claimed that a human rights approach to recognition of governments is a new option for states to explore.⁵⁴⁶ While a human rights approach will help reinforce human rights that are associated with recognition implementation and enforcement would be a significant drawback because it would result into enquires on how a government is formed, which in the first place is what states are trying to avoid in order to promote their autonomy.

7.2.5. Solutions Advanced by this Study

Based on findings in this study, and after using a comparative analysis of the effective control doctrine and all the other recognition of government approaches, it was established that a modified effective control doctrine would be the most suitable and effective solution. To this effect, the author proposed the removal of habitual obedience in the recognition practice of the effective control doctrine and the addition of a rebuttal presumption of consent. One of the reasons for this proposal is that to achieve an effective and sustainable recognition of government approach there must be a relationship between the governor and governed and that the relationship must project a balance of power. At the moment, this is missing in the current effective control doctrine because power is consecrated on the governor who is apt to abuse power in order to maintain efficacy and control.

⁵⁴⁶ Jure Vidmar "Democratic Legitimacy between Port-au-Prince and Cairo: A Reply to Erika de Wet" (2014) 108 AJIL Unbound at 210 to 212.

Therefore, to prevent power abuse and ensure that power is under check,⁵⁴⁷ governments must be accountable and governed by consent rather than habitual obedience. The advantage of this claim emerges in five different ways namely; (1) promotion of international law principle (2) constitutionality and self-determination promotion (3) accountability (4) burden of proof for regime changes and (5) Political stability.

7.3. Research Contribution

Notwithstanding the numerous literatures on the approach to recognition of government approaches, there is a considerable gap in literature on the modification of the effective control doctrine to meet current recognition of government demands. This lack of literature is probably due to the effective control doctrine being such a dominant approach. However, with high demand for the respect of self-determination and constitutionality in recognition of government practices, it is now time to review and modify of the effective control doctrine. Against this backdrop, in contributing to the body of knowledge, this study identified the major flaw affecting the effective control doctrine in meeting with current recognition of government demands and other recognition of government approaches.

Also, this study contributes to the body of knowledge by introducing a new test of a rebuttable presumption of consent to the recognition of government practice. This new test would promote self-determination rights, reduce unconstitutional regime change and importantly, promote international law principles such as sovereignty and respect of state autonomy.

Additionally, several studies have advocated for the modification of democratic legitimacy. However, no detailed research or publication to date has been made towards the modification of the effective control doctrine as done in this study. In contributing to the body of knowledge, this has now been achieved.

7.4. Future Research Directions

The author invites future research on the use of the rebuttable presumption of consent in recognition of government practices and an elaboration of how the

⁵⁴⁷ Charles De Secondat and Baron De Montesquieu *The Spirit of Laws* (Library of Alexandria, 2015) at 13.

presumption can be rebuttable during spontaneous situations such as coup d'etat and revolutions. Also, the author hopes that more research on rebuttable presumption of consent as it relates to compliance in recognition of government practices will be conducted.

7.5. Research Challenges

One of the main challenges that restricted this study in applying other research methodology is the inconsistencies in state internal armed conflicts. The inconsistencies makes information collection, assessment and analysis difficult as the author had to keep changing analysis position on democratic legitimacy and the effective control doctrine.

A solution to mitigate the problem was the use of comparative analysis approach. For instance, when studying and collecting data on the current Libya conflict, the initial position of analysis was that democratic legitimacy would be a suitable and sustainable solution, as such the effective control doctrine should be replaced. However, in October 2019 it became evident that this analysis was incorrect because General Khalifa Haftar effected regime change was supported by some states such as France, the United Arab Emirates, Egypt and Russia. In effect, Chapter Five and Chapter Six of this study had to be re-written as more evidence became available that democratic legitimacy may not be the real solution the world has been waiting for in relation to the recognition of government in international law because of inconsistent state practices on democratic legitimacy.

Another challenge encountered in this study was the measure of democracy. While the definition of democracy is unsettled in the academic world, measuring democratic states and applying a comparative qualitative analysis to determine the most recent numbers of democratic consolidation and democratic states was unachievable. One of the reasons for this was the various forms and practices of democracy by states, as a result, the author was unable to compare democratic values in states and democratic margins to an absolute core.

Another challenge in this study was different terminology used in describing the recognition of government and its approaches. Chapter Three of this study highlighted the terminology issues as it relates to government. However, during the

writing of this study, the author encountered problems as to the use of approach/approaches in the singular or plural form or criteria/criterion as used in some publications. The author settles for the word approaches to minimise confusion. As discussed in Chapter One (1.5), inherent confusion often arises in some of the recognition of government terminology and their various usage due to multiple linguistic interpretations and meaning. On one part, the author was looking for evidence on the recognition of government approaches and on another part, the recognition of government criterions.⁵⁴⁸

7.6. Demonstration of Study Solution: Applying the Rebuttable Presumption of Consent to the ongoing Libya Conflict

As discussed in Chapter Five, multiple indices strongly demonstrate that Libya has become a failed State. As at the time of writing, there is ongoing conflict among rival factions seeking effective control of the Libya territory and the administration of Libyans.⁵⁴⁹ Therefore, subject to the rules of international law (a) democratic legitimacy electioneering nor pro-democratic intervention cannot work in Libya as of today, (b) the laws of war and military intervention to restore peace would occur at the invitation of the government that is in effective control of Libya, or (c) the government in effective control could become the legitimately recognised government of Libya.

Regarding the first factor, democratic legitimacy failures are evident in Libya, and the suitability of the effective control doctrine is pronounced because democratic legitimacy cannot be achieved nor can it be a solution to the ongoing conflict. Previous attempts to initiate a democratic government had been flawed by political

⁵⁴⁸ For instance, Saranti` used the terminology "Approach" in their publication while some studies use the word criterion. While Obiora in his publication used " Criterion". See Obiora Chinedu Okafor "Democratic Legitimacy as a Criterion for the Recognition of Governments: A Response to Professor Erika de Wet" (2014) 108 American Journal of International Law. Vasiliki Saranti "Democratic Legitimacy as an Approach for Recognizing a Government: Towards the Emergence of a Regional Customary Rule in the Americas? A Reply to A Reply to Professor Erika de Wet" 2014 108 American Journal of International Law at 233.

⁵⁴⁹ Michael Cruickshank, 'Libya's Second Civil War: How did it come to this?' *Conflict News* < <https://web.archive.org/web/20150320232806/http://www.conflict-news.com/libyas-second-civil-war-how-did-it-come-to-this/>> accessed on the 28 November 2019. The Libya conflict initially began with the HoR (Tobruk Government) and the GNC (National Salvation Government), however, other rival fractions of smaller group which consisted of Shura Council of Benghazi Revolutionaries, Islamic State of Iraq and the Levant's (ISIL's) Libyan provinces, Shura Council of Mujahideen in Derna.

intolerance, ethnic issues, ideology spectrum and different agendas by contending parties.⁵⁵⁰ Similarly, a pro-democratic intervention cannot occur due to the lack of a successful democratic election and the presence of different factions who are in effective control of different regional areas of Libya. The only recognition of government approach that can be invoked is the effective control doctrine which leads to the second factor – the invocation of the law of wars (*jus ad Bellum*) and the conduct of warring factions (*Jus in Bello*).

Jus ad Bellum and *Jus in Bello* permits the faction that is in effective control to invite outside machinery to use force on Libya territory.⁵⁵¹ General Khalifa Haftar of the Libyan National Army (LNA) has been in effective control of major Libya territory, including Libya Airport in Tripoli where he declared a No-fly Zone on the 25 November 2019.⁵⁵² He has invited other states for assistance in the use force in Libya and states such as France, the United Arab Emirates, Egypt, and now Russia has assisted and supported his faction.⁵⁵³

Meanwhile, the UN-recognised Government of National Accord (GNA) though in control of some parts of Libya population and territories is not in absolute effective control as General Khalifa Haftar. One other factor that has played a significant role against the GNA is political Islam because General Khalifa Haftar is supported by those in the Libya population who are Muslims.⁵⁵⁴ As such, determining who is in absolute effective control of Libya at the moment is difficult given the external and internal supports received by both warring parties.

⁵⁵⁰ Mohamed Eljarh, 'The Supreme Court Decision That's Ripping Libya Apart' *Foreign Policy News* <<https://foreignpolicy.com/2014/11/06/the-supreme-court-decision-thats-ripping-libya-apart/>> accessed on 10 November 2019.

⁵⁵¹ Davis R Robinson "Letter from The Legal Adviser, United States Department of State" (1984) 18 Int'l L., at 381. See also, Trevor Redmond "Power to the People-Intervention to Restore Democracy" (2004) 12 ISLR at 5

⁵⁵² 'Libya's Khalifa Haftar declares 'no-fly zone' over Tripoli' *Aljazeera* <<https://www.aljazeera.com/news/2019/11/libya-khalifa-haftar-declares-fly-zone-tripoli-191124115453657.html>> accessed on 26 November 2019

⁵⁵³ 'Libya's Khalifa Haftar declares 'no-fly zone' over Tripoli' *Aljazeera* <<https://www.aljazeera.com/news/2019/11/libya-khalifa-haftar-declares-fly-zone-tripoli-191124115453657.html>> accessed on 30 November 2019

⁵⁵⁴ Ibrahim Sowan, 'Khalifa Haftar's offensive in Libya' <<https://globalriskinsights.com/2019/10/haftar-libya-offensive/>>

Presuming the UNSC ceasefire embargo on ammunition and interferences is abode by all states supporting the conflict,⁵⁵⁵ the question moves to the third factor, who deserves recognition in Libya? And how can stability be achieved in Libya based on the effective control doctrine?

To the first question, the general rule of recognition concerning the effective control doctrine applies. However, instead of the old effective control doctrine, the modified effective control with a rebuttable presumption of consent is invoked. Ideally with the new doctrine, states will examine (a) who is in control and administration of majority of Libya territories (b) who can maintain permanent control (c) who has the rebuttable presumed consent of the majority population irrespective of age, sex, ethnicity and religion.

Much available evidence would point to the GNA on two grounds because Firstly, before the July coup by General Khalifa Haftar, majority of Libyan population were in support of the GNA which consists of different ethnicity and groups in terms of age, sex and occupation. Secondly, because Libyan self-determination cannot be determined during conflicts as majority of the population has fled, states will rely on a rebuttable presumption that majority population still consent, as such the GNA would be recognised as the recognised legitimate governments of Libya and would be expected to begin the rebuilding of Libya.

Should General Khalifa Haftar or any other faction arise against the recognised government of the GNA, then the *burden of proof* will be on the warring faction of why a regime change is necessary before recognition is granted or external supports are given to such warring fraction. In effect, there will be reduction in unconstitutional regime changes, more compliance with international law principles and importantly political stability.

However, should the old effective control doctrine be applied, General Khalifa Haftar, with the support of other states' military intervention, would become the recognised government of Libya and in order to maintain effective control, he would continuously aim to achieve habitual obedience of the population and may commit undemocratic acts in order to dissuade other factions from coming to power the same

⁵⁵⁵ UNSC PV8588, dated 29 July 2019.

way he achieved power in Libya. The disadvantage of this has been discussed in Chapter Six.

7.7. Research Conclusion

It is inevitable in the light of the fluctuation in state practice reported in this study that a sustainable change will occur in recognition of governments practices and the controversies affecting the principle.⁵⁵⁶ However, apart from the effective control doctrine, problems relating to the formation and structure of the recognition of governments in international law remains a challenge. As noted in Chapter Four, some of the approaches towards eradicating this problem have been unsuccessful due to unsuitability and sustainability of some of the approaches.⁵⁵⁷

Therefore, this study concludes by asserting that eradicating the controversies surrounding the recognition of governments in international law does not necessarily entail a "democratic means" or democratic origin of governments. There are arrays of diplomatic and international instruments that could solve the recognition of government problems other than the abolishment of recognition of governments in international law and the replacement of the effective control doctrine.

It is argued that a modified effective control doctrine serves as a more sustainable solution than the acclaimed democratic legitimacy norm because it has a firm Westphalia foundation, tested by other international law principles and fills a vacuum in recognition of government practices. As demonstrated in Chapter Six, despite some disadvantages, the effective control doctrine continues to play a crucial role in promoting the autonomy of states, and the decentralisation of unconstitutional order. Its modification rather than replacement is therefore essential.

That being said, the author concludes this study by asserting that despite efforts of states and academics, the recognition of governments will likely remain a controversial principle of international of law surrounded by complexity and ambiguity. This study, therefore, in consideration of current recognition of government demands proposes the modification of the effective control doctrine to

⁵⁵⁶ fluctuations in states practice discuss in Chapter Four, Five and Seven.

⁵⁵⁷ The unsuitability of democratic legitimacy to democratic origins and its inability to address popular rebellion makes acceptance as the most compelling approach difficult.

include a rebuttable presumption of consent by keeping in mind the advice of Hans Kelsen that:⁵⁵⁸

The problem of recognition of states and governments has neither in theory nor in practice been solved satisfactorily. Hardly any other question is more controversial or leads in the practice of states to such paradoxical situations.

The fact being that recognition of governments in international law would remain characterised by a multiplicity of conflicts, conflicting interests and conflicting political intolerances.

⁵⁵⁸ Hans Kelsen "Recognition in International Law: Theoretical Observations" (1941) 35 AJIL at 605.

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